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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1203.

ISABELLA DUNCAN, APPELLANT,

vs.

THE NAVASSA PHOSPHATE COMPANY, WALTER B. McATEE, RECEIVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JULY 1, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1890.

1 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

At a circuit court of the United States for the fourth circuit, in and for the district of Maryland, begun and held at the court-house, in the city of Baltimore, on the first Monday of April, being the second day of the same month, in the year of our Lord one thousand eight hundred and eighty-eight—present, the Honorable Thomas J. Morris, judge Maryland district; Thomas G. Hayes, Esquire, attorney; George H. Cairnes, Esquire, marshal; James W. Chew, cl'k—among other were the following proceedings, to wit:

JOHN C. GRAFFLIN, Complainant, *vs.* THE NAVASSA PHOSPHATE COMPANY, Defendant. } In the Matter of the Petition of Isabella Duncan for Dower, &c.

2 *Bill of Complaint. Filed April 25th*, 1887.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland, *vs.* THE NAVASSA PHOSPHATE COMPANY, a Body Corporate of the State of New York and a Citizen of that State. } In the Circuit Court of the United States for the District of Maryland.

To the honorable the judges of the circuit court of the United States for the district of Maryland:

The bill of complaint of John C. Grafflin, a citizen of the State of Maryland, respectfully shows—

First. That the Navassa Phosphate Company is a corporation duly incorporated and organized under the laws of the State of New York and a citizen of said State of New York and transacting business and owning property in that State, but also transacting business and keeping a place of business within the State of Maryland and owning property likewise in the States of Maryland and North Carolina and within the jurisdiction of this court.

Second. That your orator is a large stockholder of said corporation, being the owner of 6,400 shares of its capital stock. The whole number of the shares of the capital stock of said company outstanding and held by stockholders is 18,301 shares, and the par val. of the stock per share is one hundred dollars.

3 Third. That on the 15th day of March, 1887, Walter E. Lawton, then the president and treasurer of said company, absconded from the State of New York, heavily involved in debt and insolvent, after having fraudulently issued and put into circulation negotiable paper to a large amount in the name of said company, either as maker or endorser, or both, the precise amount of which has not yet been ascertained.

Fourth. That although the books of said company contain no evidence of the issue of said paper, and although it was not given for real and actual transactions of the company, still the said company has been notified by the holders of a portion of said paper of their claims thereon, and that said corporation will be sought to be held responsible therefor upon the ground that it was issued or endorsed in its name by its duly appointed president and treasurer, and said company has also been notified of the intention of the holders of said negotiable paper to proceed as soon as the same matures to collect the amount thereof by legal proceedings, including seizure and attachment of its property and assets, wherever the same can be found.

Fifth. That a number of the said notes, amounting in the aggregate to near twenty thousand dollars, have already gone to protest, and that other similar notes will soon mature to a very large amount, probably between two and three hundred thousand dollars, upon which your orator is apprehensive that attachments will be issued against the property of said company in the States of Mary-
4 land and North Carolina.

Sixth. That such proceedings will manifestly be most prejudicial to said company, its creditors and stockholders, inasmuch as the same may not only result in giving an unjust priority to those parties who happen to hold the earliest maturing notes of those so fraudulently issued by said Lawton, but will also lead to a great and ruinous sacrifice of the property and assets of said company and to the waste, expense, and loss necessarily incident to a great number and variety of suits against it.

Seventh. That in view of the disastrous consequences to the creditors and stockholders of said company resulting from the seizure of its property under a multiplicity of attachments sued out by the holders of said negotiable paper against said company it is but just and right that the administration of its affairs should be taken in hand by a court of equity in this jurisdiction, where the greater part of its assets are, so that said company may be enabled to ascertain the precise extent of the claims against it upon such fraudulently issued paper, and may also be able to test its liability upon said paper without the disadvantages and embarrassments necessarily resulting from the seizure of its property under legal proceedings. With its affairs managed and administered under the direction of a court of equity it will be able to dispose of its property to the best advantage, protect its assets from ruinous sacrifices in a race of diligence amongst attaching creditors, ascertain and adjust its liabilities, and preserve a surplus for distribution amongst its stockholders.

5 Without such judicial intervention your orator charges that the assets and property of the company are in great and imminent danger of being lost, wasted, and sacrificed and the company itself made insolvent.

Eighth. Being most anxious if possible to avert this result, your orator shows that at a recent meeting of the board of directors of said company a preamble and resolutions were adopted empowering

the officers of the company to authorize an appearance on its behalf in any legal proceedings which may be instituted for what they deem to be for its protection and that of its stockholders and to consent to the appointment of a receiver of said company or of its property or assets, or both, in such proceedings, either in the State of New York or elsewhere, or both, as will more fully appear by a copy of said preamble and resolutions, herewith filed as part hereof, marked Complainant's Exhibit "A."

Ninth. That similar proceedings are about to be instituted in the State of New York for the appointment of a receiver of said corporation and of its assets and property within the jurisdiction of the courts in New York.

Tenth. That said receiver will have, as your orator is advised, and therefore charges, no jurisdiction over and no right by virtue of his said appointment to take into his possession any property of said company outside of the territorial limits of the said State of New York, and unless your honors will also appoint a receiver of the property of said company within the jurisdiction of this court
6 all the evil and injurious consequences already herebefore shown will result.

1. Your orator therefore prays that a subpœna may issue according to the course of the court against the Nevassa Phosphate Company, commanding it to be and appear in this court on a day therein named to answer this bill.

2. That a receiver may be appointed to take into his charge and possession all the assets and property of every description of said Navassa Phosphate Company within the jurisdiction of this court and to hold the same for administration under the orders of this court.

3. That this court will pass an order according to the course of the court assuming full and entire jurisdiction over the assets and property of said company which are subject to its lawful jurisdiction, and will direct notice to be given to the creditors of said company to file their claims, duly authenticated, with the clerk of this court for such orders thereon and with reference thereto as may be right.

4. And that your orator may have such other and further relief as his case may require.

And as in duty, &c.

T. M. LANAHAN,
Sol. for Comp., John C. Grafflin.

7 DISTRICT OF MARYLAND, } *To wit:*
City of Baltimore, }

I hereby certify that on this twenty-fifth day of April, 1887, before the subscriber, a United States commissioner for the district of Maryland, personally appeared John C. Grafflin and made oath in due form of law that the matters and things stated in the aforegoing bill are true as therein set forth, to the best of his knowledge, information, and belief.

ISAAC BROOKS, JR.,
United States Commissioner in and for the District of Maryland.

8 *Answer. Filed 25 April,* 1887.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland, *vs.* THE NAVASSA PHOSPHATE CO., a Body Corporate of the State of New York and a Citizen of said State.	In the Circuit Court of the United States for the District of Maryland.

To the honorable the judges of the circuit court of the United States for the district of Maryland:

The answer of the Navassa Phosphate Company, a corporation incorporated under the laws of the State of New York and a citizen thereof, to the bill of complaint of John C. Grafflin a citizen of the State of Maryland, against it in this honorable court exhibited.

This respondent admits the several matters and things alleged in the said bill, and, believing that its duty to its creditors and stockholders demands that it give its assent to the prayers of said bill, it consents to the passing of a decree as prayed, and attests the same by its seal.

And as in duty, &c.

[L. S.] S. T. WALLIS,
Sol'r for Def'd't.

9 *Order Appointing Receiver. Filed April 25,* 1887.

JOHN C. GRAFFLIN, Plaintiff, *vs.* THE NAVASSA PHOSPHATE COMPANY, a Body Corporate of the State of New York, Defendant.	In the Circuit Court of the United States for the District of Maryland.

Upon the bill, answer, and exhibits filed in this court it is, this 25th day of April, 1887, adjudged, ordered, and decreed that Thomas M. Lanahan and Walter B. McAtee, of the city of Baltimore, be, and they are hereby, appointed receivers of the property of the defendant, The Navassa Phosphate Company, within the jurisdiction of this court, with the usual powers and duties of receivers according to the law and practice of this court, including full power to demand, sue for, and collect, receive, and take into their possession all the goods, chattels, rights, and credits, money and effects, lands and tenements, books, papers, choses in action, bills, notes, bonds, certificates of stock, and property of every description belonging to said company.

And the said The Navassa Phosphate Company is ordered and directed to assign, transfer, and make over to the said receivers all the

goods, chattels, rights, and credits, money and effects, lands
10 and tenements, books, papers, choses in action, bills, notes, bonds, certificates of stock, and property of every description now within the jurisdiction of this court.

And it is further ordered that the said receivers execute and acknowledge in the usual form and file with the clerk of this court a bond in the penal sum of five hundred thousand dollars, to be approved by one of the judges of this court, to the United States of America, conditioned for the faithful discharge of their duties as such receivers.

And it is further ordered that the defendant, The Navassa Phosphate Company, its directors, officers, agents, and servants, and all other persons be, and they are hereby, enjoined from interfering in any manner with such receivers in the discharge of their duties, and from collecting or receiving any debts due said corporation, and from paying out, selling, assigning, or transferring any of the estate, monies, lands, tenements, or effects of the said corporation except to said receivers or under the order of this court, and that all persons be, and they hereby are, enjoined and restrained from bringing or prosecuting any suits or proceedings against the defendant, The Navassa Phosphate Company, or in any manner interfering with the assets of said defendant until the further order of this court.

HUGH L. BOND, *C't Judge.*

April 25th, 1887.

11 *Petition of Isabella Duncan to Have Dower Assigned, &c. Filed June 29, 1887.*

JOHN C. GRAFFLIN *vs.* THE NAVASSA PHOSPHATE COMPANY OF NEW YORK. } In the United States Circuit Court, Fourth Circuit, District of Maryland.

To the Hon. Hugh L. Bond:

The petition of Isabella Duncan, of Baltimore city, respectfully showeth unto your honor—

1st. That she is the widow of Peter Duncan, late of Baltimore city, in the State of Maryland, and now deceased, having been married to said Peter Duncan on the 19th day of December, 1850, and said Peter Duncan having died on the 26th day of January, 1875.

2nd. That on the first day of July, in the year 1857, her late husband, said Peter Duncan, discovered a deposit of guano on an island in the Caribbean Sea, not within the lawful jurisdiction of any government and not occupied by the citizens of any government, said island being called Navassa, and lying in latitude 18° 10′ north, longitude 75° west, and that on the 19th day of September, 1857, he took peaceable possession and was in occupation of said island in the name of the United States under and by virtue of an act of Congress passed 1st session of 34 Congress, chapter 164, approved Aug. 18th, 1856 (Stat. at Large, vol. II, page 140), and did, on the 18th

day of November, 1857, file his claim to said island in the
12 Department of State of the United States, in accordance with the provisions of said act of Congress, and did afterwards furnish satisfactory evidence of his said discovery, occupation, and peaceable possession to the said Department of State, and in respect to said island so discovered his assignee was declared to be entitled to the rights intended to be secured by said act.

3rd. That said Peter Duncan remained in lawful possession and was legally seized of said Island of Navassa from the 19th day of September, 1857, unto the 18th day of November, 1857; all of which will appear by the said claim of Peter Duncan as discoverer of said island and the affidavit in evidence thereof, on file with the records of the Department of State in Washington, D. C., certified copies whereof are filed herewith as part of this petition and marked I. D., Ex. A, and of the proclamation of the proper authorities of the United States (a letter which is filed herewith, marked I. D., Ex. B, shows why a copy of the same cannot be filed), and she avers that said proclamation is not in her possession, but she believes is in possession of said company; that after remaining in possession and lawfully seized of said Island of Navassa from Sept. 19th, 1857, to November 18th, 1857, as aforesaid, and which period of time was during the coverture of your petitioner, said Peter Duncan did grant and assign and convey his title and interest in said Island of Navassa to E. K. Cooper, and that by mesne assignment the title to said island became vested in the Navassa Phosphate Company of
13 New York, who now hold said island under and through the title of her late husband, said Peter Duncan, and through no other title, but does not know when said Navassa Phosphate Company became the owner of said island or who were owners since the death of her said husband; but she avers that there was a reconveyance of said island to her husband about Jan. 1st, 1860, and a subsequent conveyance of the same by her husband to E. K. Cooper; but your petitioner has not said deed of assignment, but believes they are in possession of the Navassa Company.

5th. Your petitioner further shows that she has never joined in the execution of any deed for said island or in any other manner made conveyance or release of her dower interest in the same.

6th. That she has been advised that by said act of Congress of 1st session, 34th Con., chap. 164 aforesaid, the United States assumed jurisdiction of and over said Island of Navassa and an heritable estate therein vested in her late husband, said Peter Duncan, from the time of his discovery and occupation of said Island of Navassa, and that by reason of his seizen of said estate in said island during coverture and alienation of the same without the joining of your petitioner your petitioner did at the death of her said husband become by the common law of this land entitled to her dower interest in said Island of Navassa and of the rents and profits thereof, but by reason of legal and other impediments and through no fault of hers she has heretofore believed that a demand for said dower would be fruitless.

Your petitioner further shows that said island is covered
14 largely with a deposit of guano, and the chief or entire profit of the said island consists in the sale of this guano, which constitutes a portion of the soil of said island; and she cannot ascertain in a court of law to how much and in what proportion of the said guano heretofore mined and removed by said Navassa Phosphate Company since the death of her husband she should be equitably entitled, and that all the title deeds are in possession of said Navassa Phosphate Company, and she is and has been since her widowhood unable to proceed at law for an assignment of her dower and accounts; and, furthermore, said company being under the immediate charge and control of this court, she is advised that she should ask for relief from this hon. court, which is also the proper tribunal to construe said act of Congress, and that the amount involved exceeds $5,000.

Your petitioner therefore prays that the said Navassa Phosphate Company of New York and Thomas M. Lanahan and Walter B. McAtee, the receivers of the same, may be directed to bring into this court for the inspection of your petitioner all title deeds relating to said Island of Navassa, that they may discover, under oath, to your petitioner the amount of guano mined and disposed of since the death of her said husband, Peter Duncan, and the net value or profit of the same, and that, to the extent of her dower interest therein, said Navassa Phosphate Company may be declared to have acted as trustee for your petitioner, and to hold the same in trust for her to the extent of her said dower interest, and may be directed to account with your petitioner and pay over to her such sum or amount
15 as this court may find proper.

And that this court may assign to your petitioner her dower in said Island of Navassa or a gross sum as reasonable and just commutation for the same.

And may grant such other and further relief as her case may require.

And, as in duty bound, your petitioner will ever pray, &c.

D. ELDRIDGE MONROE,
VICTOR SMITH,
Petitioner's Solicitors.

EXHIBIT "A." Filed with Petition.

No. 2830.

UNITED STATES OF AMERICA,
DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files of this Department.

In testimony whereof I, Thomas F. Bayard, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 18th day of June,
[L. S.] A. D. 1887, and of the Independence of the United States of America the one hundred and eleventh.

T. F. BAYARD.

16 To the honorable the Secretary of State of the United States:

Peter Duncan, a citizen of the United States, respectfully represents to the Department of State of the United States that on the 1st day of July, in the year 1857, he did discover a deposit of guano on an island or key in the Caribbean Sea, not within the lawful jurisdiction of any other government and not occupied by the citizens of any other government, which said island or key is called Navassa, and lies in latitude 18° 10′ north, longitude 75° west, forty-five miles or thereabouts from the Island of St. Domingo and seventy miles or thereabouts from the Island of Jamaica. The said Island of Navassa is about two miles in length and a mile and a half in width, apparently of volcanic origin, and elevated about three hundred feet above the surface of the sea, presenting a rocky, perpendicular cliff or shore on all sides except for a small space to the north. It is covered with small shrubs upon the surface, beneath which is a deposit of phosphatic guano, varying in depth from one to six feet and estimated in quantity at one million of tons.

And said claimant further represents that on the 19th day of September, 1857, he did take peaceable possession of and occupy said Island or Key of Navassa in the name of the United States and continues so to occupy the same, and is prepared to furnish satisfactory evidence thereof and of all others the requisites and facts pre-
17 scribed by the act of Congress in such case made and provided.

Wherefore he prays that said Key or Island of Navassa may be considered and declared as appertaining to the United States, and that he, the said claimant, may have the rights and advantages allowed and secured to him as such discoverer which are by the act of Congress aforesaid provided.

PETER DUNCAN.

Test: JOHN HANAN,
United States Commissioner.

UNITED STATES OF AMERICA, *District of Maryland,* } *sct:*

Be it remembered, and it is hereby certified, that on this 18th day of November, A. D. 1857, before the undersigned, a commissioner of the circuit court of the United States for the fourth circuit, in and for the district aforesaid, personally appeared Peter Duncan and made oath on the Holy Evangely of Almighty God that the matters and things stated and set forth in the aforegoing claim are true.

JOHN HANAN,
United States Commissioner for Maryland.

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I, Thomas Spicer, clerk of the circuit court of the United States for the fourth circuit, in and for the Maryland district, do hereby
18 certify that John Hanan, Esqr., before whom the foregoing affidavit was made, was at the time of taking the same a commissioner duly appointed by the circuit court pursuant to the act of Congress entitled "An act for the more convenient taking of affidavit and bail in civil causes depending in the courts of the United States," and to all his acts as such full faith and credit is and ought to be given, as well in courts of justice as thereout.

In testimony whereof I hereunto subscribe my name and affix the seal of the circuit court this seventeenth day of November, in the year of our Lord one thousand eight hundred and fifty-seven.

[L. S.] THOMAS SPICER,
Clerk of the Circuit Court.

UNITED STATES CONSULATE, *Kingston, Jamaica.* }

Before the subscriber, consul of the United States of America in and for the port of Kingston, in the Island of Jamaica, personally appeared, this 15th day of March, in the year 1858, John B. Lewis, of Baltimore, in the State of Maryland, mariner, and made oath on the Holy Evangely of Almighty God that, as agent and acting under the authority of Peter Duncan, of Baltimore, discoverer of
19 the deposit of guano upon the Island of Navassa, in the Caribbean sea, he, the said Lewis, has been since the 18th day of September, 1857, in peaceable possession of the said island, taking and shipping guano therefrom, and that said island was not when he so took possession thereof in the possession or occupation of any other government or its citizens, and that the possession of said Duncan through said Lewis and the said Duncan's other agents has not been in anywise interrupted or sought to be interrupted by any person whatsoever.

As witness my hand and seal of this consulate this 15th day of March, 1858.

JOHN B. LEWIS.

By order of the consul:
[SEAL.] R. A. HARRISON,
Deputy United States Consul.

20 EXHIBIT "B." Filed with Petition.

K. DEPARTMENT OF STATE,
WASHINGTON, *June* 18, 1887.

Victor Smith, Esqr., No. 114 Lexington St., Baltimore, Md.

SIR: Pursuant to the request contained in your letter of the 17th instant I enclose herewith duly authenticated copies of the papers

you desire concerning guano deposits on the Island of Navassa with the exception of the President's proclamation.

This latter-named instrument is not on file in this Department, but was probably given to Mr. Duncan at the time it was issued. We have simply a memorandum copy of it, which establishes the fact that a proclamation was issued.

I am, sir, your obedient servant,

SEVELTON A. BROWN,
Chief Clerk.

21 *Order to Show Cause. Filed 8th July*, 1887.

JOHN C. GRAFFLIN
vs.
THE NAVASSA PHOSPHATE COMPANY OF NEW YORK.
} In the U. S. Circuit Court, Dist. of Maryland.

On the petition of Isabella Duncan to have an assignment of her dower in the Island of Navassa and account it is ordered, this 7th day of July, 1887, that the Navassa Phosphate Company and Thos. M. Lanahan and Walter B. McAtee, the receivers, show cause by the 1st day of October, 1887, why the said petition should not be granted, provided a copy of this order be served upon said receivers and the solicitor for said Navassa Phosphate Company on or before the 15th day of July, 1887.

HUGH L. BOND, *C't Judge.*

Service of copy of above order admitted this 9th day of July, '87.

THOS. M. LANAHAN,
Att'y for Receivers.
S. T. WALLIS,
For Navassa Phos. Co.

22 & 23 *Demurrer to Petition. Filed Sep'r 30th*, 1887.

JOHN C. GRAFFLIN
vs.
THE NAVASSA PHOSPHATE COMPANY.
} In the Circuit Court of the United States for the District of Maryland:

To the honorable the judge of the circuit court of the United States for the fourth circuit and district of Maryland:

The Navassa Phosphate Company and Thomas M. Lanahan and Walter B. McAtee, receivers, demur to the petition of Isabella Duncan filed in these proceedings, because they say that said petition does not set forth any case to entitle the petitioner to the relief prayed, nor has this court any jurisdiction to entertain the same.

S. T. WALLIS,
Sol'r for Resp'd'ts.

I hereby certify that in my opinion the above demurrer is well founded in law.

S. T. WALLIS,
Sol'r for Resp'd'ts.

DISTRICT OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 30th day of September before me, a United States commissioner for the fourth circuit and district of Maryland, personally appeared Thomas M. Lanahan, one of the above-named defendants, and made oath on the Holy Evangely of Almighty God that the above demurrer is not interposed for delay.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

24 *Opinion of Court Sustaining the Demurrer. Filed July 5th,* 1888.

JOHN C. GRAFFLIN *vs.* THE NAVASSA PHOSPHATE COMPANY OF NEW YORK. } In the Circuit Court of the United States for the Fourth Circuit, in and for the District of Maryland.

In the matter of the petition of Isabella Duncan, widow of Captain Peter Duncan, to have her dower in the Island of Navassa assigned to her or to be allowed a gross sum as a reasonable commutation of the same.

This petition is filed in a case in which, upon the application of certain stockholders, the court has appointed receivers of the property of the Navassa Phosphate Company of New York for the purpose of paying its debts and administering its property for the benefit of its creditors and stockholders.

The petitioner alleges that in 1857 her late husband, Peter Duncan, discovered a deposit of guano on an island called Navassa, in the Caribbean Sea, not within the lawful jurisdiction of any government, and took possession thereof and filed his claim thereto with the State Department of the United States in accordance with the act of Congress approved August 18th, 1856 (Statutes at Large, vol. 2, page 119), and afterwards furnished to the State Department evidence of his discovery, occupation, and peaceable possession;

25 whereupon his assignee was declared to be entitled to the rights intended to be secured by said act of Congress.

That after remaining in possession of said island from Sept. 19th, 1857, to November 18th, 1857, which was during the coverture of the petitioner, her said husband conveyed his title and interest in said island to one Cooper, and by mesne assignments the title to said island has become vested in the Navassa Phosphate Company of New York, which now holds it under the title of her late husband.

That petitioner never joined in any deed of said island or in any manner released her dower therein, and she claims that under the said act of Congress the United States has assumed jurisdiction of said island, and that a heritable estate therein vested in her husband, and that upon his death, which occurred in the year 1875, she became entitled to her dower therein.

To this petition the receivers have demurred, and contend that

the interest of Peter Duncan in the Island of Navassa was not such as would give his widow any right of dower, and that there was no government having territorial jurisdiction of the island to whose laws the petitioner could appeal in support of her alleged right.

Looking to the language and purpose of the act of Congress, which was entitled an act "to authorize protection to be given to citizens of the United States who may discover deposits of guano," we find nothing which indicates that it was the intention of Congress to claim title to or to recognize in the discoverer who was to be
26 protected in the exclusive occupancy of the island for the purpose of obtaining and shipping guano therefrom any title to the land; on the contrary, the provisions of the law entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States.

It is clear that the United States extends its protection to the discoverer and his assigns solely to enable him to obtain the guano. The act of Congress does not authorize or countenance the establishment of any form of governmental authority or local tribunal. It does not look to colonization or permanent settlement. It treats these islands, as in fact they are, as unsuited for permanent settlement by civilized communities and as only temporarily occupied for the purpose of obtaining the guano.

In order that while thus temporarily occupied by citizens of the United States the occupants may not be without some lawful means of suppressing disorders the act provides that all offences or crimes committed by persons who may land on any such island or in the waters adjacent thereto should be deemed committed on the high seas on board merchant vessels of the United States and be punished according to the laws of the United States relating to such vessels and offences on the high seas.

It seems to us impossible to escape the conclusion that all that was intended was to afford governmental sanction and protection to the exercise of a commercial privilege by which guano
27 might be obtained and furnished for the use of agriculture in the United States, and it does not seem to us maintainable that, by extending this sort of protection for this purpose to an enterprise to be carried on upon small, uninhabitable coral islands in remote seas, the act of Congress extended to them the common-law doctrines applicable to heritable estates in land in highly civilized communities, including the widow's right of dower in lands disposed of by him in his lifetime without her concurrence.

Dower is always dependent upon the *lex loci rei sitæ*, and it is obvious that no system of law has ever been established on the Island of Navassa except so far as for the punishment of offenses by those temporarily occupying it the maritime law with regard to offenses upon ships of the United States has been made applicable to it.

No analogy, therefore, it seems to us, can properly be drawn applicable to these islands from the titles to lands in the northwest territorial domain of the United States or the policy established with regard to them by the ordinance of 1787. That whole ordinance looked to the early settlement and ownership of the land by citizens

of the United States and to the establishment of permanent local governments by the persons who should become resident proprietors of the soil. In the case of these islands there is no ownership except that of mere occupancy, and no patent or grant emanates from the United States nor anything approaching to it in char-
28 acter.

The act of Congress recognizes the assigns of the discoverer as succeeding to his rights, and by the act of April 2, 1872 (17 St. at Large, ch. 81, page 48) the provisions of the original act are extended to the widow, heirs, executors, and administrators of the discoverer when he shall have died before perfecting his proof of discovery or fully complying with the other provisions of the law.

This legislation is far from establishing a right of dower.

The widow, it is true, is mentioned, but by mentioning also executors and administrators the law negatives the idea of an estate in realty, and by mentioning all the persons who might by any law of succession be entitled to any property of a decedent it merely provides that any such person being entitled would be recognized as standing in the place of the deceased discoverer.

The use of the words widow, heirs, executors, or administrators does not import that Congress intended to legislate that the discoverer's right was to be regarded either as realty or personalty, but that whoever by the law of succession governing the decedent's estate might be entitled should be recognized.

There is a proviso to this act of April 2, 1872, which is in these words: "Provided that nothing herein contained shall be held to impair any rights of discovery or any assignment by a discoverer heretofore recognized by the Government of the United States."
29 So that if by mentioning the widow in the act of April 2, 1872, it could be maintained that any additional right or estate was conceded to her it could not aid her in this case, as we understand from the petition that the Government did before the passage of that act recognize the assignment by Peter Duncan to Cooper and declared the assignee to be entitled to the rights secured by the law.

In our judgment the demurrer must be sustained and the petition dismissed.

Decree Dismissing Petition. *Filed July* 11, 1888.

JOHN C. GRAFFLIN
vs.
THE NAVASSA PHOSPHATE COMPANY OF NEW YORK.

In the Circuit Court of the United States for the District of Maryland.

The petition of Isabella Duncan filed in the above-entitled case and the demurrer thereto having been argued, heard, and considered, and it appearing to the court that the petitioner is not entitled to the relief prayed:

It is thereupon by the court, this 11th day of July, 1888, ad-

judged, ordered, and decreed that the demurrer to the petition of the said Isabella Duncan be, and the same is hereby, sustained, and that said petition be, and the same is hereby, dismissed, with
30 costs to be paid by the petitioner.

THOS. J. MORRIS, *Judge.*

MEM.—25 October, 1889, T. M. Lanahan discharged as receiver, in pursuance of the order of the 24th of Sept., 1889, and W. B. McAtee sole receiver from this date.

Prayer of Appeal and Order Thereon. Filed March 8th, 1890.

GRAFFLIN
vs.
THE NAVASSA PHOSPHATE CO. } In the United States Circuit Court.

In the matter of the petition of Isabella Duncan.

To the honorable judge of said court:

The petitioner, Isabella Duncan, respectfully prays your honor to grant an appeal to the Supreme Court of the United States from the decree heretofore filed sustaining the demurrer to her petition to be allowed dower, &c.

ISABELLA DUNCAN, *Petitioner.*
VICTOR SMITH,
D. ELDRIDGE MONROE,
Petitioner's Solc.

Witness:
J. S. BURKE.
E. D. LLOYD.

Ordered, this 8th day of March, 1890, that the said peti-
31 tioner, Isabella Duncan, be allowed her appeal to the Supreme Court of the United States, as prayed, and that she is required to enter into stipulation in the sum of one hundred dollars for costs.

THOS. J. MORRIS, *Judge.*

Appeal Bond. Filed March 17th, 1890.

Know all men by these presents that we, Isabella Duncan and Joshua S. Burke, of Baltimore county, State of Maryland, are held and firmly bound unto the Navassa Phosphate Company and Walter B. McAtee, receiver, in the full and just sum of one hundred dollars, to be paid to the Navassa Phosphate Company, Walter B. McAtee, receiver, their certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately at a hearing of a petition filed by Isabella Duncan

in a suit depending in the circuit court of the United States for the district of Maryland between John C. Grafflin, complainant, and The Navassa Phosphate Company, respondent, when said Isabella Duncan, by her petition, asked to be allowed her dower, and upon demurrer to the same judgment was rendered against the said
32 Isabella Duncan, and the said Isabella Duncan having obtained an order of appeal and filed a copy thereof in the clerk's office of said court to reverse the order sustaining the said demurrer in the aforesaid suit, and a citation having been issued, directed to the Navassa Phosphate Company and to the receivers appointed in said suit, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on second Monday of October next:

Now, the condition of the above obligation is such that if the said Isabella Duncan shall prosecute her appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation is void; else to remain in full force and virtue.

ISABELLA DUNCAN. [SEAL.]
JOSHUA S. BURKE. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOHN DUNCAN,
As to Isabella Duncan.
HENRY T. MELONEY,
As to Burke.

The aforegoing bond is thus endorsed, to wit:

This bond is approved as security for costs only and is not to operate as a supersedeas.

THOS. J. MORRIS, *Judge.*

33 Thereupon it is ordered by the court here that a transcript of the record and proceedings in the matter of the petition of Isabella Duncan in the plea aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next.

And the same is transmitted accordingly.

Test: JAS. W. CHEW, *Clerk.*

DISTRICT OF MARYLAND, *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the district of Maryland, do certify that the foregoing is a true and full record in the matter of the petition of Isabella Duncan in the therein-entitled cause.

The Seal of the Circuit Court, Maryland.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court on this 22nd day of March, A. D. 1890.

JAS. W. CHEW,
Clerk of said Circuit Court.

34 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

To the Navassa Phosphate Company, Walter B. McAtee, receiver, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to the appeal of Isabella Duncan from a decree of the circuit court of the United States for the district of Maryland in your favor, passed in a cause in said court in equity, wherein Isabella Duncan was a petitioner in the case of John C. Grafflin, complainant, and you were defendant, to show cause, if any there be, why the said decree so as aforesaid passed should not be corrected and speedy justice done to the parties in this behalf.

Witness my hand and the seal of the said circuit court on this 17th day of March, A. D. 1890.

The Seal of the Circuit Court, Maryland.

THOS. J. MORRIS, *Judge.* [SEAL.]

Service admitted this 18th day of March, 1890.

S. T. WALLIS,
Sol. for Nava. Co. & Receiver.

[Endorsed:] Isabella Duncan *vs.* Navassa Phosphate Co. Citation. 13.

Endorsed on cover: Maryland C. C. U. S. No. 1203. Isabella Duncan, appellant, *vs.* The Navassa Phosphate Company, Walter B. McAtee, receiver. Filed July 1, 1890.

Office Supreme Court U. S.
FILED,
JAN 9 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890. **No. 1203.**

ISABELLA DUNCAN, *Appellant*,

vs.

THE NAVASSA PHOSPHATE COMPANY AND WALTER B. McATEE, RECEIVER, *Appellees*.

Appeal from the United States Circuit Court for the District of Maryland.

APPELLANT'S BRIEF.

VICTOR SMITH,
D. ELDRIDGE MONROE,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890. No. 1203.

ISABELLA DUNCAN, *Appellant*,

vs.

THE NAVASSA PHOSPHATE COMPANY AND WALTER B. McATEE, RECEIVER, *Appellees*.

Appeal from the United States Circuit Court for the District of Maryland.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

Peter Duncan, sea captain, and resident of Baltimore, discovered the Guano Island of Navassa, July 1, 1857, and on September 19, 1857, he took possession with the intention of claiming benefit of the Act of August 18, 1856, (Rev. Stat., page 1080,)—and occupied the same several months. He filed the claim (dated November 18, 1857,) as required by the Act, in due time, (Compts' Ex. A, page 8 of Record.) And from 18th September, 1857, at least until March 15, 1858, was engaged in taking and shipping guano from said island. (Affidavit of Captain Lewis, page 9 of Record.)

The bond required by the Act, and dated September, 1858, was filed, upon request of the Secretary of State, (dated July

12, 1858;) by Duncan's assignee; and the proclamation giving notice that the United States had assumed jurisdiction, appears to have been issued in 1858.

At some time, not precisely known to appellant, Duncan assigned his interest to Mr. Cooper; though whether to *E. O.* Cooper or E. H. Cooper (his son) does not appear with certainty.

In this connection, and as appellant will hereafter have occasion to refer to them, we ask the Court to judicially notice Executive Doc. No. 37 of the U. S. Senate, 1st Session, 36th Congress, (and which this Court in the late case of Jones vs. The U. S., appeal from the U. S. Circuit Court of Maryland, October Term, 1890, decided to refer to, of its own motion, as matter of executive history,)—this correspondence, and the accompanying document all being copies of those on file in the Executive Department relating to Navassa. In a letter therein of April 23, 1858, (page 5, Ex. Doc. No 37,) Mr. E. K. Cooper applies to Mr. Cass, Secretary of State, as agent and representative of (his father) *E. O.* Cooper, assignee of Peter Duncan.—although bond is stated to have been given by E. K. Cooper, as assignee, and the Proclamation of the President is reported in Jones vs. U. S. to have been made to E. K. Cooper, as assignee of Peter Duncan. With this uncertainty regarding the assignment, and with these facts before her, Mrs. Duncan, knowing that the Island had been sometime in possession of her husband, before and after he filed his proof of discovery, &c.; makes general reference to the assignment, in order to present all the facts fairly to the Court, as far as known, and asks discovery.

Subsequently, about July, 1860, as alleged in appellant's petition, there was a reconveyance of the Island to Peter Duncan by one Cooper, and a reconveyance to E. K. Cooper, (this is admitted by the demurrer); and petitioner asked for a discovery of the respondent's title. She did not join in the execution of *any* deed, or release her potential right of dower in the same. Afterwards, by mesne assignment, the title of the Island vested in the Navassa Phosphate Company of New York, the present owner.

About April 25, 1887, a stockholder of the Navassa Phosphate Company, John C. Grafflin, filed a bill in the U. S. Circuit Court of the District of Maryland, against the Navassa Phosphate Company, for the appointment of a receiver; (page 1 of Record,) to which the said company appeared and answered, (page 4 of Record,) and on April 25, 1887, an order was filed appointing Thomas M. Lanahan and Walter B. McAtee, receivers of the company, (page 4 of Record,) for the purpose of paying its debts and administering its property for the benefit of its creditors and stockholders.

On October 25, 1889, Mr. Lanahan withdrew as receiver, and Mr. McAtee was at the time of this appeal sole receiver. (See page 14 of Record.)

Capt. Peter Duncan died January 27, 1875, and Isabella Duncan, his widow, filed her petition for a discovery of the Navassa Company's title, for an account of profits, and for an assignment of her dower interest—or proper commutation of the same, (page 5 of Record,) alleging the matter in dispute to be over $5000, which petition was duly served on the receivers. To this the Navassa Phosphate Company and the receivers demurred. (Page 10 of Record.)

The demurrer was sustained by the Court below, and appellant's petition dismissed; and an opinon and order thereon to that effect, filed July 5, 1888, (page 11 of Record,) from which order an appeal was taken March 8, 1890, (page 14 of Record,) and transcript of record duly transmitted to this Court.

Facts Admitted by the Pleadings.

There are certain allegations in the petition of appellant which are admitted by the demurrer to be true, and are to be considered as facts in the case.

That during coverture, her husband discovered and held possession of the Island, and filed claim and proofs of the same, and held whatever was his title to, &c., in the Island.

That Peter Duncan was in lawful possession of the Island from September 19, 1857, certainly until November 18, 1857, (as shown by his claim, page 8 of Record); and further,

until at least March 15, 1858, as shown by affidavit of his agent annexed to the claim, (page 9 of Record,) the claim and affidavit being filed with the petition as Exhibit "A."

That Peter Duncan was a second time seized of the Island by virtue of an assignment from Cooper in 1860.

That Mrs. Duncan never released her dower interest.

That the Island of Navassa was covered with guano, *which constituted part of the soil of the Island.*

It does not seem to be disputed that the guano on this Island has, in the course of time, become mineralised, and is phosphatic rock which is mined or dug out of the ground. See testimony referred to in Record in case of Jones vs. U. S. before cited.

That it is a mineral and so mined or excavated, is conclusively settled in "the memoir of the Island of Navassa" by Eugene Gaussoin, mining engineer and mettalurgist, (a work to be found in the Peabody Library, of Baltimore,) and probably in other public libraries.

It describes the guano as phosphatic earth and rock of different degrees of hardness, entirely inorganic and found under the surface of the Island even to the depth of 300 feet, as well as on the surface and in pockets.

He characterizes it all through his work as a mineral, (pages 6, 9, 18, 19, 20, 22 and 23,) being the dung and bones of birds and lizards, metamorphosized into a true mineral—phosphate of lime. This work is the report of an expert, sent by the Navassa Company to examine the Island.

The claim or notice of Duncan, (page 8 of Record,) and part of respondent's chain of title, says the Island is covered with small shrubs, upon the surface, *beneath which* is a deposit of phosphatic guano, &c.

Duncan's interest was in a mine proper.

"A mine is an excavation in the earth for the purpose of removing minerals." Bouvier's Law Dic., Tit. "Mine."

"If working is underground, it is a mine; if on the surface, it is a quarry." McSwinney on Mines, page 4.

"Minerals include any article obtained from the earth by underground work." McSwinney on Mines, page 12.

"Coprolites, the fossil dung of animals held to be minerals." McSwinney on Mines, 12.

"Minerals are all fossil bodies or matter dug out of mines or quarries, whence anything may be dug." Bouvier's Law Dic. Tit. "Minerals."

Showing then that this guano was a mineral attached to the surface of the earth or dug from beneath it, we establish the position that the estate was that of a mine.

The Department of Interior classify mines and minerals, thus:

"Whatever is recognized as Mineral by the standard authorities, where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws."

Pub. Dom. p. 986. SEC. KIRKWOOD, *Oct. 1881.*

ASSIGNMENT OF ERRORS.

The Circuit Court erred in sustaining the demurrer and dismissing the petition; and in each and all the points decided in its opinion which led to that result, viz:

1st. The Court erred in deciding (page 12 of Record,) that it was not the intention of Congress, in the Act 1856, August 18, to claim title to, or recognize in the discoverer, any title to the land; or, that the islands were in any sense to become part of the territorial domain of the United States.

2d. The Court erred in deciding that all that was intended by the Act was to afford governmental sanction and protection to the exercise of a commercial privilege, (that of obtaining guano.)

3d. That the Court erred in deciding that the Act of Congress did not extend to such Island, the common law applicable to heritable estates in land, including the widow's right of dower.

4th. And it erred in deciding that no system of law exists on the Island of Navassa, except for the punishment of offences.

5th. The Court erred in deciding that "in the case of these Islands there is no ownership, except that of mere occupancy; and that no patent or grant emanated from the United States, or anything approaching it in character."

Appellant's Points.

As to the First Error.

This Court has lately, (in the case of Jones vs. The United States, appeal from U. S. Circuit Court for Maryland, October Term, 1890,) in regard to this Island of Navassa, decided "that Courts are bonnd to take judicial notice of the territorial extent exercised by the government whose laws they administer, as appearing from the public Acts of the Legislature and Executive, although such Acts were not formally put in evidence or pleaded;" and from the Statute of 1856, Aug. 18, and from papers filed in the Department of State, communicated by the President to the Senate on April 12, 1860, and printed by order of the Senate in Executive Document No. 37 of the first Session of the Thirty-Sixth Congress, (which correspondence we ask to be considered in this case.)

The Court held in the above case of Jones vs. U. S., and referring to said correspondence: "That terms of the order of the President of July 7, 1858," (sending an armed vessel to protect Duncan's assignee); "of his response of November 17, 1858, to the protest of the official representative of Hayti, and of his proclamation of December 8, 1859, clearly show or necessarily imply that the President, exercising the discretionary power conferred upon him by the Constitution and Laws, was satisfied that the Island of Navassa was not within the jurisdiction of Hayti, or of any foreign government; and that it should be considered as appertaining to the United States;" and summing up their opinion, the Court says: "That the Island of Navassa must be considered as appertaining to the United States."

As to the Second Error.

"That the Act was only intended to afford governmental protection to the exercise of a commercial privilege," is evidently based upon the Court's construction of the Act just shown to be erroneous, viz: that the Island did not appertain to the United States, and was not under its dominion. In fact, the entire opinion is based on this construction.

It is admitted, as a rule of international law, that a discoverer cannot acquire title to the land discovered, except it is likewise annexed to some government—excepting a bare possessory title. And it is likewise true that, without extending its dominion, the Government may protect its citizens in the temporary exercise of their rights of fishing, hunting, mining, &c., in land not belonging to any nation, and discovered by them.

But again, as said in Jones vs. The United States: "The discoverer's country may avail itself of the law of nations, authorizing it to acquire dominion over the Island by such discovery and occupation, and may authorize the discoverer *actual, continuous* and useful possession, although for the purpose of carrying on a particular business, such as fishing or working mines." And the nation to which they (the discoverers) belong, may exercise such jurisdiction, and for such periods as it sees fit, over the territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands.

The right of Duncan was clearly a right of exclusive occupancy for the purpose of mining, what at once became a part of the national domain, and being derived directly from the Statute, was a statutory grant of an interest in realty and in mines, and by no means merely that vague property a commercial privilege.

How does this interest differ from the grant of a mining right on Public Land, which is well known to be heritable?

"Discovery and appropriation are the source of title to mining claims and development, the condition of their subsequent possession." O'Reilley vs. Campbell, 116 U. S., 422.

Even the possessory title to a mining claim is recognized in the United States Court, owing to the valuable nature of its interests. Sparrow vs. Strong, 3 Wall. 104.

The fact that the right to work the guano beds was a right of "profit *a prendre*" from the soil—(aside from other reasons)—makes it realty. Washburn on Easements, 13. Massoit vs. Moses, 3 S. C. 194 (N. S.) Chapman vs. School Dist., 1 Deady, 113.

Says Washburn: "If the easement consists in a right of "profit *a prendre*," such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself, that if granted to one in gross, it is treated as an estate, and may therefore be to one for life or inheritance."

"A license to dig, coupled with authority to take them away, is an incorporeal hereditament." McSwinney on Mines, 249, 252.

And it must be borne in mind that this right of "profit *a prendre*"—or this mining right—is coupled with a right of *exclusive occupancy* of the Island.

"Exclusive use or dominion over the land carries the land itself." 3 Washburn on Real Property, 406.

"Patentee of mining claim obtains the same title as passes by patents generally." Wade on Mines, sec. 72.

"Has title to the land, and all fixtures and appurtenances that ordinarily pass by a grant of real estate." Id. sec. 68. 17 Cal. 199.

"The right to develop and work the mines is property, and it may be sold, mortgaged and inherited." Forbes vs. Gracy, 94 U. S. 767. McSwinney on Mines, page 263.

"Is subject to the laws of descent as other property, and regarded as real estate." Wade on Mines, sec. 153. 2 Col. L. Rep., 62. 23 Cal., 501. 1 Utah, 173. 4 Mon., 299, 367, 550; also Campbell vs. Rankin, 99 U. S. 262.

As to the Third Error.

"That the Court erred in deciding, as it did, that the Act of August 18, 1856, did not extend to such islands the common law applicable to heritable estates in land, including the widow's right."

As to the Fourth Error.

"That no system of law exists on the Island of Navassa, except for the punishment of offences."

The Statute does not in words extend any system of law over the Island, except criminal, but we may safely assume that in authorizing the annexation of unoccupied land without an existing system of laws, it was not the intention to let the act of annexation be unaccompanied by the first concern of civilized government, the assurance and protection of property rights, but rather, as part of the national domain, to extend over it "the general system of common law and equity, as it prevails in this country," (136 U. S. 63, Mormon Church Case,) or so far as Federal laws—being paramount—failed to cover property rights, then the laws of the State of which the owner was a citizen should govern; it having full control over the property of its citizens in the absence of any law to the contrary. 125 U. S. 205, Maynard vs. Hill.

As part of the system of Federal law, the descent of property and the right of a widow to her dower were especially embodied in the ordinance of 1787, section 2, which took away the right of primogeniture and saved to the widow her dower. No one would question that the abandoment of the right of primogeniture is engrafted upon our system of laws as a Nation, and yet the right of the widow to dower has equal authority and even greater, for her right had existed from time immemorial in the mother country, and from the founding of the Colonies. And the ordinance of 1787, does not create a new right but preserves and sanctions an existing one, "*saving always* to the widow of the intestate, the third part of the real estate for life." Ord. 1787, (Rev. Stat. 13.) It will be noted that this ordinance is embodied in the Revised Statutes, together with the

Articles of Confederation, the Declaration of Independence, and the Constitution, (by Act 1877, ch. 82,) under the title "The Organic Laws of the United States."

By making this ordinance the basis of the organization of nearly every territory, either directly or by reference to the organic acts of other territories embodying it, Congress has time and again made it part of our policy and law; and has reiterated the command of the American people, that in their common and public domain, there shall be no right of primogeniture, and that the widow shall be entitled to and *saved* her dower.

This view, that the law governing property in this island is the general system of common law and equity prevailing in this country, including the ord. of 1787, is sustained by the case of the Morman Church, vs. the United States, 136 U. S. pages 57, 63, 65.

"When the positive law affords no specific provision for the actual cases that arise, the subject must necessarily be governed by those principles of reason and public policy, which prevail in all civilized and enlightened communities, 136 U. S. page 57.

And page 65 of same case, the Court refers to the ordinance of 1787, in deciding the point, that "in case of escheat, the power to dispose of the land in favor of the public schools, is beyond doubt." Because schools and education were regarded by the Congress of the Confederation, (the Congress that confirmed the ordinance of 1787,) as the most natural and obvious appliance for the promotion of religious morality. To the same effect is the case of Cooper vs. Roberts, 18 How. 179.

The great ordinance of 1787, (Rev. Stat., 13,) confirmed by Congress, August 7, 1789, and repeatedly recognized by Congress, (1 McLean, 367; 107 U. S. 688; 123 U. S. 295; 119 U. S. 546,) is the basis of all our public land laws. ("The Public Domain," page 150.)

It was intended to be a formal declaration of the policy of the government in regard to its public land, as the ordinance itself says, it is "to fix those principles as the basis of all laws,

constitutions and governments which forever after shall be formed in the territory." Spooner vs. McConnell, 1 McLean, 365.

It (sec. 1,) formulated the American doctrine of descents, and took away the right of primogeniture, making this important reservation "*saving always to the widow of the intestate, the third part of the real estate for life.*"

Under this saving clause the right of dower has been declared a vested interest. Johnson vs. Vandike, 6 McLean, 422.

"By virtue of ordinance 1787, dower existed as at common law from all periods in the territory, and *not* by virtue of State Act, 1804. Betts vs. Wise, 11 Ohio, 219. See also O'Farrell vs. Simplot, 4 Iowa, 381.

In May vs. Rumney, 1 Mich. 4, dower was sustained, and declared a vested right. In these three last cases, the point was decided that under the Ordinance of 1787, the widow was entitled to dower *as at common law*—that is, in any lands *held at any time during coverture* by her husband, and *not* alone those held at his death.

The ordinance of 1787 was a compact between the States as to the future national policy regarding public domain, and afterwards sanctioned by Congress, thus becoming the law of the land.

"The common law when applicable, the ordinance of 1787, and the land laws, constitute the general law or policy of the government regarding public lands, and are all to be construed together, and as having relation to the general system." Opinion Atty. Gen., 2nd opinion, page 44. Revised Stat., sec. 1891, page 333.

"The general policy of the ordinance 1787, must be considered as continuing for the benefit of States to be thereafter organized." Morton vs. Nebraska, 21 Wall. 669.

"Ordinance 1787, has become the rule of government, sufficiently strong to vest title in State in school lands, because of reservation in the ordinance." Cooper vs. Roberts, 18 How. 179.

Part of Ohio, called Western Reserve, was not ceded by Connecticut when the ordinance of 1787 was passed, and defendants claimed it was not subject to its provisions. Held that "when consenting to come into the Union, they came *under federal laws*, and *became subject to the ordinance.* Palmer vs. Commrs., 3 McLean, 228."

It should be held furthermore that as far as Federal laws fail to apply to the property and personal rights of Duncan, to that extent should the laws of the State of Maryland govern. The effect upon Mrs. Duncan's petition would be the same under either condition; as the common law of dower prevails in Maryland, 60 Md. 524. If this Court holds as in 18 Howard, 591, "that 'marital rights are rights attached to the contract,' then Mrs. Duncan upon marriage became entitled to a dower right in every piece of real and inheritable estate of which her husband would be at any time seised, and not subject to the laws of any other State."

In 125 U. S., page 205, (Maynard vs. Hill,) the Court says; "Marriage, as creating the most important relation of life * * * has always been subject to the control of the Legislature (State); that body prescribes the age; the form essential; the duties and obligations; its effects upon property rights of *both present* and *prospective.*"

Laws of United States, and of his own State, govern every citizen, *and his property:*—as far as they do not conflict.

Moore vs. People, 14 How. 20.

A State has undoubted right to regulate the disposition of the property of her citizens, by descent, devise or alienation.

Wilcox vs. Jackson, 13 Pet. 576.

As to the Fifth Error.

The Court said: "there is no ownership, except mere occupancy, and that no patent or grant emanated from the United States, or anything approaching it in character."

The title of Duncan was derived from the second section of the Act: "The said discoverer or discoverers, or his or their

assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the *exclusive right of occupying said Island*—rock or key—for the purpose of obtaining said guano."

Interpreting the phrase, "at the pleasure of Congress," the Attorney General, in 9th opinions, Attorney General, page 32, says, referring to guano islands: "It is technically accurate to call one a tenant at will who holds an estate liable to be terminated whenever his landlord sees fit. Under this Act, *the discoverer of a guano island is the nations' tenant at will;* and that will is to be expressed by Congress whenever the nation may desire to put an end to the estate granted."

Holding as tenant, under direct grant from Congress, clearly it is an error to say he had no sort of title or ownership. So far from there being no patent or grant emanating from the United States, or anything approaching it; Duncan's title came direct from the statute—was a statutory grant.

"If discovery be made and possession taken, it is for benefit of whole country, and becomes part of the nation; it can only be granted by that organ of the government which has power to dispose of the Public Domain." 8 Wheat. 543, Johnson vs. McIntosh.

Congress exercised this right, and by a general law granted the guano islands to all discoverers, who also became possessors and occupants.

The Court says, in Tamely vs. U. S. Freehold Co., 3d Otto, 663: "A grant may be made by law as well as by patent, pursuant to law."

To the same effect is Ryan vs. Carter, 93 U. S. 78.

And in Rutherford vs. Green, (2 Wheat. 196,) say: "A legislative grant may convey lands without making use of technical words as in a deed."

The discoverer holds an inheritable estate. It was certainly not an estate for years. And as between the parties to this suit, the Navassa Company, claiming under Duncan, and holding now, years after his death, are estopped from denying that it was an estate greater than life—one of inheritance.

"Assignee cannot dispute title of grantor." 2 Scrib. on Dow., 231, 251. Brown vs. Potter, 17 Wend. 164. 1st Scrib. on Dow., 369. 1 Wash. on R. P., 191. Herm. on Estop., Vol. 2, sec. 49. Herm. on Estop., sec. 849.

"Widow need only show that husband was in possession during coverture, claiming title. This, unless explained away, is sufficient." 2 Scrib. on Dow., 212, 214. 1 Amer. Lead. Cas., Real Es., 316, 317.

"Possession of ancestor is presumption that he was seized in fee." 6 Md., 86. Bull N. P., 103.

Where statutes grant land, but are silent as to descent, the estates are heritable, and as such, dowable.

The Oregon Donation Act, (9 Stat. 497,) is analagous to the Guano Island Act, in that occupation is the condition precedent and consideration for the grant; it is also silent as to descent, yet it is held to convey an interest, inheritable and *dowable.*

"Under Oregon Donation Act, four years' residence constitutes an estate inheritable and alienable." Johnson vs. U. S., 2 N. & H. 391. U. S. vs. Fitzgerald, 15 Pet. 407.

It constituted a fee, although a base fee. Chapman vs. School Dist., 1 Deady, 113.

"Widow of donor who dies after four years' residence, but before final proof, entitled to dower in half which descends to children." McKay vs. Froeman, 6 Ord. R. 449.

"Dower given in donation, claims the mere holding being regarded as sufficient seizin." Ebby vs. Ebby, 1 Wash. Ter. 185.

This is further evidenced in regard to the Guano Island Act, by an Act supplemental to it. (1872, ch. 81, Stat. 17, page 48.)

If the discoverer died *before possession and occupancy,* his widow lost her derivative rights. (Opinion Atty. Genl., "Parker widow case," 14, opinion page 608.) The Act 1872, was evidently intended to remedy this hardship by allowing her

to complete the conditions precedent to title, but it is also evident that the intention of Congress was to give her the same derivative rights she would have held had her husband possessed and occupied the island—that is of course, dower—the statute being construed in accordance with common law. Dower is her only derivative right. 8 Ord. R. 148. Love vs. Love.

And as said by the Court below. this Act of 1872, April 2d, chapter 81, "mentions all the persons who might, by any law of succession, be entitled to any property of decedent."

In thus extending the provisions of the Act of 1856 to the "widow, heirs, executors or administrator of such discoverer, who shall have died before perfecting proof of discovery, &c.," there is nothing inconsistent in the widow, heirs and executors having *each* an interest in the island; it is very reasonable to assume this in accordance with the ruling in the case of Forbes vs. Gracey, 94 U. S., 765, which says, "the ores, when dug or detached from the lands under a mining claim, * * * are free from any lien or claim of the United States, and *becoming personal property* * * * are, *as such*, subject to State Taxation."

The analogy is striking between the title of the discoverer of Guano Island, with his right of exclusive occupancy; and right to dig the guano: and the title to mining claim, which gives "locator, his *heirs* and assigns, right of exclusive possession and enjoyment of all the surface between the lines of location." It is, beyond a doubt, from the use of the words "*heirs* and assigns," in Sec. 2322 Rev. Stat., and from the ruling in Forbes vs. Gracey, page 767, that the mining claim itself, as distinguished from the detached ores, is inheritable. This is further sustained in Noyes vs. Mantel, 127 U. S., 353, quoting from and sustaining Belk vs. Meager, 104 U. S., 279, "a mining claim perfected under the law, is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

So much of the guano as was mined and detached from its bed, at the death of the discoverer, being personal property, would go to the executors, while the mining right or interest

in the island, being real property, would descend, according to the common law of the land, to heirs, and to the widow; to the first—subject to the dower right of the second;—is this not more in accordance with the usual interpretation of a statute, than to suppose by "mentioning executors and administrators, the law negatives the idea of an estate in realty?" (Page 13 of Record.)

It is understood that the appellant does not claim under this Act of 1872, her husband having died some time before that year—but we consider it in the nature of a statutory recognition of the widow's derivative right—and the widow's only right at common law is dower.

Duncan, having complied with all conditions depending on his sole volition—discovery—occupancy—possession—filing proof—(it being not at his discretion, but the President's, by whom and when the other conditions, filing the bond, should be observed,) these conditions were the only conditions precedent, and having brought himself into the class who were the beneficiaries of the Act; an heritable estate vested in him at the time of this compliance; when he filed his claim and proofs—and related back to the time of the occupation of the island. His right from its inception had positive governmental sanction. Not only was he authorized to discover, but he was *required* "to take possession in the name of the United States"—and allege the fact in his proof—implying an immediate extension of authority, and vesting of statutory rights, subject to the discretion of the President in ratifying them.

The general nature of the conditions precedent of this law is analagous to those of the Pre-Emption Act, Oregon Donation Act, and the Mining Act; it is a general grant to all who qualify themselves to become grantees, and bring themselves within the description of those designated as grantees. Thus, under the Donation Act, those who have resided four years are grantees. Under the Pre-Emption Act, those who have performed certain conditions. Under the Mining Act, those who have discovered a lode. Under the Guano Island Act, those who have discovered, possessed and occupied an island.

It was an estate upon condition precedent.

In 9 Op. Atty. Genl., pages 30 and 367, (Johnson's Island Case,) cited with approval by this Court in Jones vs. U. S., Atty. Genl. Black says, "the following facts must be established to enable the President to exercise the power conferred upon him by the Act of 18th August, 1856, viz:

"*1.* That a deposit of guano has been discovered upon an island by an American citizen.

"*2.* That the island is not within the lawful jurisdiction of any other government.

"*3.* That it is not occupied by the citizens of any other government.

"*4. That the discoverer has taken and kept peaceable possession thereof,* IN THE NAME *of the United States.*

"*5.* That the discoverer has given notice of the facts as soon as practicable, to the State Department, on his oath.

"*6.* That the notice has been accompanied by a description of the island, its latitude and longitude.

"*7.* That satisfactory evidence has been furnished the State Department, showing that the island was not taken out of the possession of any other government or people."

No mention of a bond as a condition precedent.

Mr. Seward, Secretary of State, says, (Whart., Dig. Int. Law, Vol. 3, page 65): "To enable an alleged discoverer of a guano deposit to make title under the Act of May 10, 1867, it is necessary to prove—

"*1.* Citizenship.

"*2.* That the deposit had not been previously discovered by another. That the island was, at the time, not in the occupation or jurisdiction of any other government."

But does not mention the bond as necessary to make title.

Mr. Black, in his opinion, says: "before they shall *keep* exclusive possession, they shall file a bond." The word "keep" is significant, and implies a continuation of an estate already

vested, the performance of a condition subsequent. As a fact, it would be impossible for one in the station of life occupied by the beneficiaries of this Act, to obtain large bond until the title were assured to him.

Under the decisions, the title would vest when conditions were first performed; as against U. S. would remain inchoate until notice filed; and when completed would relate back to the time of first performance of the condition.

"From the date of discovery, the discoverer has certain rights respecting the mines, that are indefeasible, except by the government." Wade on Mines, 24. Noyes vs. Mantel, 127 U. S. 351.

"Whenever the settler, (under Oregon Donation Act,) completed 4 years' residence, and otherwise conformed to the Act, * * * he took the grant, and his right to a legal transfer of the title from the U. S. became vested; their estate in the land was one they could devise, or which would descend to heirs." Hall vs. Russell, 101 U. S., 510. Also, Vance vs. Burbank, id., 514.

In McKay vs. Freeman, 6 Oregon, 449, dower was allowed the widow in donation claim, where donee had died *before patent.*

For further authorities on this point see U. S. vs. Fitzgerald, 15 Pet., 407. 17 How., 559. 13 Pet., 499. 12 Pet., 454. Johnson vs. U. S., 2 N. & H., 391. Stark vs. Stam, 6 Wall., 413. Gibson vs. Chonteaur, 13 Wall., 101.

The Secretary of Interior says, (Lester's Land Reg. and Doc., 395): "Pre-emption right, when established, must be considered as attaching from date of settlement."

"Discovery and appropriation are the source of title to mining claims and development, by working the condition of their subsequent possession. O'Reilly vs. Campbell, 116 U. S., page 422.

In considering whether the filing of the bond was a condition subsequent, we will refer to the principles laid down by Washburn in his work on Real Property. He says, (2d Wash. on R. P., 5th Ed., page 7):

"If the act or condition required does not necessarily precede the vesting of the estate, but may accompany it or follow it, and if the act may as well be done after as before the vesting of the estate, or if it be the evident intention of the grantor that the *estate shall vest*, and the grantor perform the act after *taking possession*, then the condition is subsequent"—also, Davis vs. Gray, 16 Wall. 229.

No one can question the title (and seizin before assignment to Cooper,) but the grantor, the government.

"When land is granted on condition subsequent, no one other than the grantor, or some one in privity with him, can assail the title of the grantee on the ground of his failure to perform the conditions, and this as well when the grant is by government, as when it is by a person." Schulenberg vs. Harriman, 21 Wall. 44—also, Fremont vs. U. S., 17 How. 560, 561. Hanson vs. Berry, 1st Copp's Pub. Ld. Laws, 630.

"The breach of a condition subsequent not followed by a limitation over, does not, *ipso facto*, work a forfeiture * * it only vests in the grantor or his heirs, a right of action for the land which he can enforce without actual entry or demand, but cannot transfer to a stranger." Roch vs. Rock Island, 97 U. S. 693. U. Pac. R. R. vs. Mayers, 5 Montana, 111.

The executive branch of the government evidently regarded the bond as a condition subsequent. The papers on file in the State Department, (Ex. Doc. 37,) above referred to, and judicially noticed by this Court in Jones vs. U. S., October Term, 1890, and referred to in opinion in that case, shows these facts as fully put before the State Department, to wit: November 18, 1857, Duncan's claims sworn to. March 17, 1858, letter of his agent showing that he was digging and shipping guano—(Pet. Ex. A., pages 8 and 9 of Record)—the date of filing these papers does not appear. June 17, 1858, letter of Mr. Cooper showing that he was shipping guano. June 24, 1858, letter of Mr. Cooper to the president, stating that he had ninety men on the island, and had brought home three thousand tons of guano. Yet, with this knowledge that Duncan, and Cooper, his assignee, had been exercising

full ownership of the island, and *had not* filed a bond, the president took no steps to forbid their work until bond filed; but on July 7, recognized this complete title by referring to these letters, and with them as a basis, ordering the Secretary of Navy to "direct a competent force to repair to the island and protect the citizens of the United States in *removing the guano therefrom.*" And after all this, on July 12, 1858, the Secretary of State reminds Cooper that a bond is required, which was furnished September 2, 1858. Would the president have thus protected Duncan's interest if a bond was a condition precedent? And the President's Proclamation or that of the Secretary of State, although not filed in this case, is said to be dated December, 1859, over one year later. It will be noticed that the title of Duncan and Cooper was beyond question identical up to September 2, 1858—the date of filing the bond—and it was *this title* that was the subject of the controversy with Hayti.

It is hard to see that the Proclamation of the Secretary of State conferred any other or greater interest upon Mr. Cooper than he had as assignee of Mr. Duncan. No authority is given the president by the Act to issue anything in the nature of a patent, or to in any manner convey title. On the contrary, the control over the island is reserved by Congress; his special authority is to decide whether or no the island shall appertain to the United States. (Sec. 1.) To regulate the penalties and securities on the bond, (sec. 2,) and to employ the land and naval forces of the United States at his discretion, to protect the discoverer's rights. As to this distinction, see 133 U. S. 496.

There is no mention, direct or by inference, of a proclation as necessary to vest title.

The Court, in Jones vs. U. S., holds that a proclamation was not necessary, but any Act showing the president's finding was enough. We are justified in holding that the proclamation did not vest Cooper with any estate he did not already hold as assignee; that it was an official declaration that certain acts had been done, but the legal effect of such performance depended on the grant under the statute.

The following presents the principle in a strong light: "A clause in a grant subjecting it to approval, did not prevent title from passing at time of execution of instrument, such approval was not a condition precedent, but until approval the estate was subject to be defeated." Hornsley vs. U. S., 10 Wall. 225. 18 How. 1. 18 How. 557. U. Pac. R. R. vs. Mayers, 5 Montana, 111.

Even in a concession of land upon condition or subject to president's approval, "the title of grantee became absolute on issue of president's order of approval, had relation back to the passage of resolution, (inception of title,) and so took precedence of intermediate patent." Repub. Riv. Bridge Co. vs. Rivay, 92 U. S. 315.

Under the doctrine of estoppel, it is plain that Cooper or his assigns cannot deny Duncan's title

No title, not *in esse*, will pass by deed unless the deed contain a covenant of warranty, in which case it operates as an estoppel as to such future title. Herman on Es., Vol. 2, page 809.

Nothing is known as to the deed to Cooper—certainly no covenant of warranty is shown. It follows then that if Cooper claimed a title at all, he must admit that Duncan had a title *in esse*—when the assignment was made.

Duncan's Second Seizin.

It appears in Mrs. Duncan's petition as an allegation, which allegation the demurrer admits as a fact; that Peter Duncan was *a second time* seized of the island, by reason of a conveyance from Cooper in 1860, which would include the estate as perfected by the filing of the bond, and issuing of the proclamation; if such was the effect, or of Cooper's title was in any way superior to Duncan's.

By this second assignment Duncan became undoubtedly seized of the entire estate; and furthermore, the present company claiming under him, and holding title after his death, and the death of Cooper, if that is of importance, are estopped from denying that the estate was greater than a life estate, *i. e.*, an heritable estate.

Finally, the Court erred in sustaining the demurrer.

If the Circuit Court was in error on the several points decided, and if, as is claimed, the converse is true: then it erred in sustaining the demurrer.

1st. The appellant holds that by the Act of 1856, Duncan became seised as tenant at will (at least) of the Island of Navassa, and of the right to mine the guano or phosphatic rock thereon, this title vesting at time of discovery by relation.

2d. That the island became part of the Public Domain by the recognition of the President, relating also to time of discovery, or filing of claim.

3d. That as such it was subject to the general system of common law and equity, as it prevails in this country, including the right of dower as an incident to such an estate as Duncan's—this right being confirmed by the Ord. of 1787—supplemented by the law of Maryland.

4th. That he was seised a second time in 1860.

We find by the well settled law of dower, that Mrs. Duncan was entitled to the relief prayed for, if appellants are correct. in the above points.

At common law and the law of the States, a widow was entitled to *dower in all estates of inheritance which her husband had at any time during coverture been seized.*

"Including liberties and profits savoring of the realty." Scrib. on Dow., 199.

"And of all corporeal hereditaments and incorporeal hereditaments savoring of the realty." Bishop on Mar. Wom., vol. 1, sec. 256.

"Is dowable in mines on husband's land, and in mines of husband on lands of another if opened during husband's lifetime." Bishop on Mar. Wom., vol. 1, sec. 263. McSwinney on Mines, 262. Id. 48. 2 Scribner on Dower, 30. Tudor's Lead. Cas., 3d ed., page 68. Staughton vs. Leigh, 1 Taut., 410. 2 Scrib. on Dow., 31. Id. ch. 23, secs. 19, 20. Bishop vs. Bishop, 5 Jur., 931.

Guano was mined during Duncan's Seisin
on Lyon - (p. 9 of Record)

As to Sufficiency of the Pleadings.

Allegations that complainant was wife of one who was seized of the land: his death; his alienation of the land during coverture; and of possession with claim of title, under husband's title, by defendant, is *prima facie* sufficient. For a widow is not presumed to know the precise nature of her husband's title. 2 Scrib. on Dower, 157, and cases cited.

As Regards the Estate.

"She is entitled to dower in estates at will—conditional estates until terminated by grantor—and in defeasible estates as long as they exist." 1 Scrib. on Dow., 267. Id. 290. Id. 369. Tud. Lead. Cas. Eq., page 70. 1 Wash. on R. P., 228.

"Though seisin be tortuous, it will give dower until *true owner* avoid it." Bish. on Mar. Wom., vol. 1, page 325.

"Only a momentary seisin is required, if beneficial." 1 Bish. on Mar. Wom., sec. 325. 1 Wash. on R. P., 228.

Was Duncan Seised?

Under his first seisin, there is no doubt about Duncan having been legally in possession of the island for many months. This, in itself, is sufficient seisin as against those claiming under him. As has been shown before, even possessory mining titles are recognized by the government.

"Seisin in fact implies possession, there being no legal difference between the words seisin, if the possession be with the intent to claim a freehold interest." 1 Wash. on R. P., 3d ed., 137.

The right to hold the land was termed seisin. 1 Wash. on R. P., 44.

Possession is evidence of *seisin in fee* of the possessor, and is good until defendant shows anterior possession or traces title from paramount source. Keene vs. Cannovan, 21 Cal., 291.

A grant of land by the government is tantamount to a conveyance with livery of seisin. 3 Washburn on Real Prop., 203.

Duncan's assigns are estopped from denying seisin.

If a tenant at will make a feofment, the feofer is estopped from denying his seisin in an action brought by his widow to recover dower. 1 Scribner on Dower, page 369. 2 Scribner on Dower, pages 231-251.. 2 Scribner on Dower, pages 212-214. 1 Washburn on Real Prop., 191. Amer. Leading Cases on Real Estate, pages 316-317.

That he was seised a second time in 1860, is admitted by the pleadings.

Jurisdiction.

The question of jurisdiction and Laches may have been raised by the demurrer, but was not mentioned by the Court in its opinion, and did not constitute one of the grounds of sustaining the demurrer, under the ruling in "Coffe vs. Grover, 123 U. S., 31."

The Court had jurisdiction over the *defendant.*

"Voluntary appearance of defendant gives jurisdiction." Jones vs. Andrews, 10 Wall. 327. 12 Pet. 525. 56 Md. 127.

The *petitioner* having a claim against the respondent company and claiming an interest and lien on the corpus of the property, she comes in, not only on the invitation of the Court to creditors, but because the proper way to have her rights adjudicated, is to come into this suit by petition.

Parties claiming adverse title came in by petition. "This, (says the Court,) is the appropriate remedy on behalf of a person claiming a paramount legal title to an estate which has been brought into the possession and safe keeping of a Court of Chancery, pending litigation respecting it." Wiswall vs. Sampson, 14 How. 68. Refers to Angell vs. Smith, 9 Ves. 335.

"Creditors who are allowed to prove debt, are regarded as *quasi* parties and can come in by petition." Anderson vs. Jackson R. R., 2 Woods. 630.

Any objection to her coming in by petition must be made in the Court below.

The Court has jurisdiction to order discovery and account and afford relief by decreeing a conveyance of such an interest as will be equivalent to dower interest or commutation of the same.

The entire property is in Court. A petition is the only proper proceeding for an assignment of interest as co-owner, and payment of arrears of profit as to a creditor or *cestui que trust.*

"Court of Equity will order an assignment of dower in a creditor's suit upon petition of the widow of the debtor." 2

Scrib. on Dow., 155. 2 Bl. Ch. 509, 512. Id. 354 note. Id. 356 note. 3 Bl. Ch. 341.

"Courts having jurisdiciton of the estate or proceeds, will allow the widow's dower out of the money. 1 Wash. on R. P. 306, and notes.

All parties of interest are in Court.

"The Court having obtained jurisdiction over the parties and subject matter, will retain it for all purposes within the general scope of the equities to be enforced." Ober vs. Gallagher, 3 Otto, 199. 9 How. 390. Russell vs. Clark, 7 Cranch. 69. 13 Pet. 511.

Discovery is prayed.

Jurisdiction for discovery carries jurisdiction for relief. Story's Eq. Jur., 13th ed., vol. 1, page 629.

These principles are not changed because property is a mine.

It is a federal question by virtue of different citzenship of parties, and Court has jurisdiction in dower. Barrett vs. Farling, 111 U. S. 523. Abbott Nat. Dig., vol. 2, note, page 298. Laidley vs. Huntington, 121 U. S. 179.

"Chancery has concurrent jurisdiction in dower, especially where discovery or account is prayed, and *where parties will accept gross sum in lieu of dower.*" Herbert vs. Wren, 7 Cranch. 370. 2 Scrib. on Dow. 153. Story's Eq. Jur., vol. 1, page 624. 2 G. & J. 468. 25 Md. 532.

The petitioner and respondent being before the Court, (the property virtually under control of the Court,) the Court can afford relief and decree a conveyance by respondent of an interest in the island, though not within its special jurisdiction, nor within the special jurisdiction of any other Court.

Having a right, the petitioner is certainly entitled to a remedy.

"That there should be no remedy where a clear right exists, is a monstrous absurdity." Op. Jus. Taney, Kendall vs. U. S., 12 Pet. 624. See two cases reported in 1 Cowp. 108,

109, where English Court exercised jurisdiction over Labarador and Iceland, foreign settlements. See also Penn vs. Lord Balto., 1 Ves., 454.

Having jurisdiction of parties, Court can determine rights even of third parties, as to property within custody of Court. Carswell vs. Canal Co., 4 Biss. 195.

Having jurisdiction of parties, Court can decree conveyance of property, even outside of the jurisdiction of the Court—acting *in personam*. 2 Story Eq. Juris., sec. 62. 2 Kent Com., page 463, note (*d.*)

"Equity can impose such conditions, and grant such relief as the circumstances of the respective parties may require." Hunt vs. Rousmaniera, 1 Pet. 1.

"Equity jurisdiction is exercised *in personam*, and not *in rem*, and depends on the control over the parties, and not on the place where the land lies." Hunt vs. Sanson, 110 U. S. 151.

"Court of Equity having jurisdiction of the person, may decree a conveyance by him of land in another State, and enforce the decree by process against the person." Muller vs. Dow., 94 U. S. 449. 16 Pet. 25.

In Lewis vs. Darling, 16 How. 1, compelled title holder to give force to a lien on land out of jurisdiction.

Dower is a lien. *In re* Mull, 2 F. 71. See also 111 U. S. 525. 6 Pet. 389. 6 Cranch, 148.

Title to island is under government grant, and Federal Court will construe it and enforce equities. 13 Wall. 102. 13 Wall. 72.

This Court takes cognizance because the interpretation of a U. S. Statute is involved. U. S. vs. Shurtz, 102 U. S. 396.

Finally, her claim is highly meritorious, and springs from the moral right which a wife has to a share of what her husband acquires during coverture.

"The right of dower is a right of the highest order, and favored by the Courts." Wash on R. P., vol 1, page 198, (5th Ed.) Addison vs. Bowie, 2 Bl., 626.

"Right of dower does not result from contract, but is a *positive* institution of State, founded on Public Policy." 1 Wash. on Real Prop., 198.

"As regards his wife, the legal duty of maintaining her, fastens *a lien* upon his property, of which he cannot deprive her," (i. e., dower.) 2 Bland, 626, Addison vs. Bowie.

It stands in common law on the same elevated plane with life and liberty.

"The law favoreth three things: 1. Life. 2. Liberty. 3. Dower." Lord Bacon.

That this right, so old, so favored, founded on natural law, should exist in an American colony, is to be presumed. It is fair to assume that if Congress wished to take away this right, as well as the right of inheritance, of which estate it is an incident, Congress would have so declared "Acts of Congress should not be construed as altering the common law further than the words import." (101 U. S., 565.)

VICTOR SMITH,

D. ELDRIDGE MONROE,

Counsel for Appellant.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the U. S.

October Term, 1890.

No. 1203.

ISABELLA DUNCAN, APPELLANT,

vs.

THE NAVASSA PHOSPHATE COMPANY,
AND OTHERS.

Appeal from the Circuit Court of the United States, for the District of Maryland.

S. T. WALLIS,
For the Appellees.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

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THE NAVASSA PHOSPHATE COMPANY *and* OTHERS.

Appeal from the Circuit Court of the United States, for the District of Maryland.

BRIEF OF THE APPELLEES.

This case arises out of a claim of Isabella Duncan, widow of Peter Duncan, deceased, to have dower assigned to her, out of an alleged interest of her husband in the privilege granted by the United States to take guano from the Island of Navassa.

The Navassa Phosphate Company, a New York Corporation, having its principal office and place of business in the City of Baltimore, was placed, temporarily, in the hands of a receiver, on the 25th of February, 1887, for the purpose of protecting its

assets from being sacrificed to meet certain fraudulent issues of its paper by one Lawton, its President and Treasurer, who had absconded after grossly abusing his trust. The proceedings, in Equity, of the Circuit Court of the United States for the District of Maryland, in that regard, will be found in the Record (pp. 1 to 5). On the 29th of June, 1887, the Appellant filed a petition in those proceedings (Rec., pp. 5 to 7), in which she alleged that she was the widow of Peter Duncan, late of Baltimore City, having been married to said Duncan on the 19th of December, 1850, and he having died on the 26th of January, 1875. She alleges that on the 1st of July, 1857, her husband discovered a deposit of guano on Navassa Island, and that on the 19th of September, in the same year, he took peaceable possession and was in occupation of said Island in the name of the United States, under and by virtue of the Act of Congress of 1856; that on the 18th day of November, 1857, he filed his claim to said Island in the Department of State, in accordance with the provisions of said Act, and afterwards furnished satisfactory evidence to the said Department, so that his assignee (Edward K. Cooper) was declared to be entitled to the rights intended to be secured by said legislation. She further charges that her husband remained in lawful possession and was legally seized of said Island from the 19th day of September to the 18th day of November, 1857. She files certified copies of Duncan's claim as discoverer and the affidavit in evidence thereof, and exhibits also a letter from the chief clerk of the State Department to her counsel (Rec., pp. 9 and 10) as a reason for not filing a copy of the proclamation issued by the Secretary of State. The chief clerk states in his letter that the proclamation was not on file in the Department. This was a mistake—a certified copy thereof having been recently furnished from the State Department, in the case of Jones *vs.* The United States, No. 1143, of the docket of the present term. It will be found on page 2 of the printed

office copy of the opinion of the Court, delivered by Mr. Justice Gray, in that case. Mrs. Duncan's petition further states, that on or about the 18th of November, 1857, her husband, having continued in possession and lawful seisin of the Island, assigned his interest in the same to E. K. Cooper, and that, by mesne assignment, the title thereto has become vested in the Navassa Phosphate Company of New York, which now holds the same under and through the title of Duncan, and no other title. She avers her ignorance of the time when the Navassa Phosphate Company became the owner of the Island, and of the parties who have been owners since her husband's death. She further avers, that about January 1st, 1860, there was a reconveyance of the Island to her husband, and a subsequent conveyance of the same to E. K. Cooper. She adds that she has not said deeds of assignment, and believes them to be in the possession of the Navassa Phosphate Company, but she charges that she has never joined in the execution of any deed for said Island, or in any other manner made conveyance or release of her dower interest in the same.

The petition then claims (Rec., p. 6) that by the Act of Congress referred to, the United States assumed jurisdiction of and over the Island of Navassa, and that a heritable estate therein vested in her husband from the time of his discovery and occupation; that by reason of such seisin during their coverture and the alienation of the same without her participation, she did, at her husband's death, "*become, by the common law of this land,*" entitled to her dower interest in said Island and the rents and profits thereof "but by reason of legal and other impediments and through no fault of hers she has heretofore believed that her demand for dower would be fruitless." Appellant further charges, that the Island is covered largely with a deposit of guano, and the chief or entire profit of the same consists in the sale of this guano, which constitutes a portion of the soil of said Island, and she

cannot ascertain in a Court of Law to how much and in what proportion of the guano mined and removed by the Navassa Phosphate Company, since her husband's death, she should be equitably entitled; that all the "title deeds" are in the possession of the Navassa Phosphate Company, and she has been, since her widowhood, unable to proceed at law for an assignment of her dower and for accounts, and furthermore, said Company being under the immediate charge and control of the Circuit Court, she is advised that she should ask relief from that tribunal, which is also the proper tribunal to construe the said Act of Congress. She further states that "the amount involved" exceeds $5000. She then prays that the Company and receivers may bring into Court, for her inspection, all title deeds relating to the Island, and that they may discover, under oath, the amount of guano mined and disposed of since the death of said Duncan and the net value or profit of the same, and that, to the extent of her dower interest therein, the Company may be declared to have acted as trustee for her and to hold the same in trust for her, and may be directed to account with her and pay over to her such amount as the Court may find proper. There is a further prayer that the Court may assign to her her dower in the Island, or a gross sum as a reasonable and just commutation for the same, with a final prayer for general relief.

To this petition the Appellees demurred (Rec., p. 10). The Circuit Court sustained the demurrer and dismissed the petition. Its opinion will be found in the Record (pp. 11 to 13).

The extent and effect of the legislation of Congress, in regard to Guano Islands has been so recently considered and thoroughly illustrated in the exhaustive opinion of the Court, in the case of Jones *vs.* United States already referred to, as to leave but little room for further discussion. It was determined, in that case, that it is the right and duty of the Court to take judicial notice of all

public acts of the Legislature and Executive, in such cases, whether they accord, or not, with the pleadings, or are formally put in evidence. Although, therefore, the questions in this case arise under petition and demurrer, it will be assumed that all the historical and other public facts found by the Court, in the opinion alluded to, will be as fully considered here as if they appeared upon the record. While it is stated in Mrs. Duncan's petition, (Rec., p. 6, Art. 3) that "after remaining in possession and lawfully seized of said Island of Navassa" from September 19th down to the 18th of November, 1857, Peter Duncan assigned his title and interest in the Island of Navassa to E. K. Cooper, it is not stated, in terms, whether the proclamation of the proper authorities of the United States conferred the privileges and advantages arising under the Act of Congress on Cooper or on Duncan. By reference however to the proclamation itself, as given by the Court in the case of Jones (pp. 11 and 12 of the printed office copy of the opinion) it will be seen that the President announced that Cooper was "entitled, in respect to the guano on the said Island, to all the privileges and advantages intended by the Act to be secured to citizens of the United States who may have discovered deposits of guano," and that he had entered into sufficient bonds under and according to the Act of Congress. Whatever inchoate claim therefore Duncan may have had, by reason of his having discovered the deposit of guano on the Island of Navassa and taken peaceable possession thereof, no rights were ever consummated in him, and his claim passed to Cooper, his assignee, in a couple of months, as a foundation for the exclusive rights conferred upon the latter, by the proclamation. Inasmuch as by the terms of the Act of Congress (Rev. Stat., Sec. 5570) the Island, &c., on which any deposit of guano may have been discovered is not to be considered as "appertaining to the United States," except at the discretion of the President, until that discretion

is exercised none of the privileges for which the Statute provides can become vested in any one, either discoverer or assignee. As stated, by Mr. Secretary Cass, in his letter of July 1st, 1857, to Messrs. Wood & Grant, (3 Wharton, Dig. Int. Law, Sec. 311), although the President, upon being satisfied on the several preliminary points indicated by the Statute, "may, in his discretion, regard the Islands containing the discovered deposits as belonging to the United States, *he is not obliged to do so.*" The Secretary adds, "it is only after this preliminary decision has been made, that it becomes necessary to determine whether the discoverers may have exclusive possession of the Island for the purpose of taking off the guano and selling it." In the case then before him, he informed his correspondents, that there had been "no decision by the President recognizing the Island of Sombrero as the property of the United States, and of course none authorizing exclusive possession in the discoverers or their assignees." This letter is referred to, with approval, by the Court, in the case of Jones, and the opinion there decides, in terms, that "when the President determines that the Island shall be considered as appertaining to the United States, *and not before*, Sec. 2 of the Statute authorizes him to allow the discoverer or his assigns the exclusive right, subject to be terminated by Congress at any time, for the purpose of obtaining and selling the guano, he first giving bond with such penalties and securities as may be required by the President, &c." (Printed office copy, p. 5). The proclamation as issued by the Secretary of State, in the name of the President, recites that Cooper had entered into sufficient bonds under and according to the Act of Congress, and was therefore entitled, as has already been stated, to the privileges and advantages intended to be secured by that Act.

It would seem impossible, consequently, with great respect to the counsel for the Appellant, to find color for the proposition set up

in the Sixth Article of the petition (Rec., p. 6), that "a heritable estate [or indeed any estate], vested in Duncan, from the time of his discovery and occupation of the Island of Navassa." All the interest that he ever had was a right to invoke the exercise of the President's discretion, as to whether or not he should declare the Island to appertain to the United States. That interest he parted with on the very day he filed his claim, and two years before the discretion of the President was exercised by the proclamation in favor of Cooper. It will be assumed, therefore, for the purposes of this brief, that even if there be any tenable grounds, otherwise, for the contention of the Appellants, none can be predicated of the mere fact of Duncan's original discovery and possession.

Although the right to dower, asserted by the Appellant in the Sixth Article of her petition, is claimed thereby to arise entirely out of an alleged heritable estate vested in Peter Duncan from the time of his discovery and occupation of the Island of Navassa and his alleged seisin of such estate, probably the ground will be taken in the Appellant's brief, though not taken below, that if such seisin did not exist in Duncan by virtue of his original discovery and possession, he became seized of the alleged heritable estate, by reason of a reconveyance of the Island, which is alleged towards the close of the Third Article of the petition to have been made to him. The language of the petition in this regard (Rec., p. 6) is the following: "She avers that there was a reconveyance of said Island to her husband about January 1st, 1860, and a subsequent conveyance of the same by her husband to E. K. Cooper, but your petitioner has not said deeds of assignment but believes they are in possession of the Navassa Company." Accordingly she prays (Rec., p. 7) that the Defendants may be directed to bring into Court for her inspection all title deeds relating to the Island of Navassa. It is assumed to be clear law that where any fact constitutes a material allegation in the bill and

especially where it is the foundation of the suit, it must be clearly stated, even although it be a fact which rests within the knowledge of the Defendant.

Story's Equity Pleading, Sec. 256.

If, as the learned writer states by way of illustration, a bill seeks a discovery as to any fact, it will not be sufficient to allege that the Plaintiff has been informed of that fact, but the fact must be positively averred. The statement, in the present petition, that the Appellant "believes" that the deeds of assignment of which she speaks are in possession of the Navassa Company, is therefore not such an averment as renders the demurrer an admission that any such deeds are actually in the Company's possession. Nor is this any less true, because of the subsequent statement, in the paragraph of the petition at the top of page 70, that "all the title deeds are in possession of said Navassa Phosphate Company." It is quite impossible that a complainant can be permitted in the same pleading to aver a fact upon mere belief and then aver it upon knowledge (Morris *vs.* Morgan, 10 Sim., 347), especially when the very averment that she has not the deeds, and the absence of any averment that she has ever seen them, render it obvious that she can have no ground for her allegation except mere belief. She does not even go so far as to say that her averments are founded upon information. In fact the whole of the allegations in regard to the reconveyance of the Island to her husband about January 1st, 1860, and a subsequent conveyance of the same by her husband to E. K. Cooper, are wanting in the precision and positiveness which the rules of Equity pleading require in a party asserting the grounds of his own title. If the Appellant has any case at all, she is presumed to know what it is and whence derived. It is a fundamental principle of Equity pleading, that "whatever is essential to

the rights of the Plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision."

Story's Equity Pleading, Sec. 255.

While a reconveyance to Duncan, "about January 1st, 1860," is alleged, it is not stated by whom that reconveyance was made, nor whether Duncan ever took possession thereunder; nor is there any averment as to the date at which the alleged "subsequent conveyance" was executed by Duncan to Cooper. As to whether, therefore, the so-called "seisin," which Duncan is claimed to have acquired through the deed of January 1st, 1861, was of such a character or duration as to be the foundation of dower, or why said deed was given, or whether the seisin was not instantaneous merely, and for temporary purposes or otherwise, there is nothing averred. The proclamation of the Executive, declaring Cooper to be the assignee of Duncan, bore date December 8th, 1859, as has been shown, only three weeks before the alleged reconveyance to Duncan, and the averment that Duncan conveyed back to Cooper, without any averment that he had intermediate possession or enjoyment, affords good legal ground for the inference that the whole transaction, if it occurred at all, was merely temporary, involving no actual transfer of interests. This state of case alone would suffice to show that the main fact on which the Appellant's title is rested is insufficiently pleaded, and does not furnish the Appellees with necessary and proper information as to the precise foundation of the Appellant's demand. (Wormald *vs.* De Lisle, 3 Beav., 18.) Moreover, the whole averments on the particular point, taken together, amount to a conclusion of law and not a statement of fact. In the absence of any law of the United States, prescribing the form or character of conveyance by which transfers of real estate (if any) held, under the authority of Congress, in Guano Islands, may be made, or in any way regulating such transfers, it is manifest that a sufficient averment of legal transfer can only be

made by *profert* of the instrument of transfer, or description of it, if it cannot be exhibited. Otherwise, the mere averment that a conveyance was a transfer of seisin is but the averment of a legal conclusion, drawn by the party pleading from an instrument neither produced nor described. If it be answered that this is the case with all simple averments of conveyances, the reply is plain. In ordinary cases, where titles to realty pass by conveyance, as at common law or under statutory prescriptions, a conveyance averred is presumed to be such a conveyance as is required by law. But, in the case at bar, there is no statute affecting the matter, and whether it is controlled by the common law—"the common law of this land," as it is called in the petition (Rec., p. 5, Art. 6), is merely matter of law, and the very matter in controversy. The averment, therefore, that a conveyance has been made, which passes seisin, is a begging of the question at issue and can only be made upon the assumption, as matter of law, not merely that the alleged conveyance was valid at common law, but that the common law furnished the test of its validity.

The Appellees, therefore, respectfully claim, not only that the matter pleaded—if regarded as pure matter of fact—is ill-pleaded, and therefore not admitted by the demurrer; but that, if regarded as involving an inference or assumption of law, it is alike within the rule, which exempts a demurrer from being treated as an admission, *quoad hoc*.

Dillon *vs.* Barnard, 21 Wall., 430, 437.

Indeed, taking the averments all together, as already suggested, and coupling the averment of the petitioner's "belief," that the deeds are in the possession of the Company, with her prayer to have them produced for "her inspection," it is difficult to reach any other conclusion, than that the petitioner is speaking, throughout, from mere belief, as to the alleged conveyances, and that the demurrer

consequently admits, as fact, that her belief is truly alleged, but does not admit the truth of the fact which she alleges that she believes.

Walton *vs.* Westwood, 73 Ill., 125.

LACHES.

It appears, on the face of the petition, that more than twelve years elapsed between the death of Duncan, on January 26th, 1875, and the first claim of his widow to dower, which was not made until June 29th, 1887, when the petition was filed. There is no explanation whatever of this delay. It appears by the Third and Sixth Articles of the petition, that all the knowledge which Mrs. Duncan has now, she was possessed of at the time of her husband's demise. The only excuse which she gives (Rec., foot of p. 6) for her inaction is that "by reason of legal and other impediments" (which she does not specify), and "through no fault of hers, she has heretofore *believed that* a demand for said dower would be *fruitless.*" The "impediments" alleged are not claimed to have affected the assertion of her rights, but only her belief as to the fruits which her demand would have yielded. The Navassa Company had been so prosperous, as appears by the bill under which the receivers were appointed (Rec., p. 2), that its assets were sufficient, when the bill was filed, to pay all the large obligations fraudulently cast upon it by its defaulting president, and still leave a surplus for its stockholders.

Indeed, there is no pretense of averment that its liability, if any, for dower to Appellant might not have been enforced by her at any time. Nevertheless she has seen fit to let the company go on for all these years, making heavy expenditures in the development of the guano beds, and accumulating, as she now claims, large amounts of money at its cost, for her benefit, without ever intimating that she asserted any claim, although the office of the com-

pany, for the active transaction of its business, was in Baltimore, where she resided, and its affairs were open to scrutiny, at her suit, at any time. Though the alleged conveyance to her husband could not be recorded, and there was no notice to the world of its existence, she allowed stock to be bought and sold in the Company, and credit to be given to it, without possible knowledge of her claim. It is now well established that the defence of limitations or laches may be raised under demurrer, when patent on the face of the bill.

Lansdale *vs.* Smith, 106 U. S., 391, 393.
Speidel *vs.* Henrici, 120 U. S., 377, 387.
Bryan *vs.* Kaler, 134 U. S., 126.
Belt *vs.* Bowie, 65 Md., 355.
Foster's Federal Practice, 176.

It is equally rudimental, that where undue lapse of time does appear from the face of the bill, it will be conclusive unless explained and countervailed by specific averment of facts sufficient to excuse it.

Badger *vs.* Badger, 2 Wall., 87.
Lansdale *vs.* Smith, 106 U. S., 393, 394.

It is respectfully submitted that the petition at bar fully confesses undue delay, and makes no lawful or sufficient excuse for it. Assuming, for the sake of argument, that the statute of limitations does not apply to demands for dower, there is no longer any doubt that the defence of laches is independent of statute and will be allowed, in a proper case, in equity, even where there is a statute, though the time lapsed be less than that which the statute prescribes.

Hayward *vs.* National Bank, 96 U. S., 611, 617.

As to the Alleged Seisin.

Assuming however, for the sake of argument, that the objections taken above to the petition and its averments are not con-

clusive against it, and still following out the theory of the Appellant that there is a "common law of this land" under which a claim for dower may arise, the next question which presents itself is as to whether there was ever any "estate" in Duncan out of which dower could grow. For the purpose of determining this, it seems entirely unnecessary to consider the authorities referred to in reference to the general question of a widow's dowable interest in mines. The President's proclamation in the case, and the legislation which authorized it can alone define the interest which the discoverer or his assigns are clothed with, and an examination of these appears to afford no countenance to the claim of the petitioner that her husband at any time acquired or was seised of a heritable estate. It is patent, upon the face of the Act of Congress, and so recognized by the Court in Jones' case already referred to, that nothing was intended to be conferred except the authority to take guano from the Island, under the protection of the government of the United States. It was the discovery of the guano deposit, and not the discovery of the Island, which the Statute contemplated and in terms provided for, and the very proclamation itself, in words, confers the privileges and advantages in question on Cooper, only "in respect to the guano on the said Island." Sec. 5573 of the Revised Statutes describes the privileges which may be conferred thereunder as "the exclusive right of *occupying* such Islands, rocks or keys for the purpose of obtaining guano, and of selling and delivering the same to the citizens of the United States, to be used therein, prescribing the price per ton at which the guano shall be sold within reach of the ship's tackle or while in its native place of deposit." By Section 5574 the person to whom the privileges are granted is required to give bond, conditioned to deliver the guano to citizens of the United States for the purpose of being used therein, and to none others, and at the price prescribed, as well as to provide all necessary facilities for

that purpose, within a time to be fixed in the bond; and any breach of the provisions of the bond is to be deemed a forfeiture of all rights accruing under the Act of Congress. As is stated in the diplomatic correspondence referred to by the Court in Jones' case, and quoted at length in Wharton's International Law Digest, Sec. 311, the object of the law is to benefit American agriculture, by promoting the supply of guano at a reasonable price. Whenever the President in his discretion determines to act under the statute, he must, according to Secretary Cass, be satisfied that the guano found upon it is sufficient in quantity and quality to justify the measure. When he has so determined, the Island is considered as "appertaining to the United States," but the Act is not to be construed as obliging the government to retain possession of the Island after the guano shall have been removed from the same (Rev. Stat., Sec. 5578). In his note 104 to Section 176 of the 8th edition of Whart., Elements of International Law, Mr. Dana uses the following language in respect to the legislation in question: "In fact," he says, "it secures to citizens the usufruct of unoccupied guano deposits, which they have discovered and peacefully occupied, beyond the jurisdiction of any foreign State, upon certain terms as to the sale and exportation of the guano, and stipulates for nothing beyond the usufruct while the guano remains." In the whole diplomatic correspondence referred to, the right to remove the guano from the Island of Navassa is all that this government desires or announces its determination to protect. In the opinion of Attorney-General Black (9 Opinion of Attorney-General, pp. 30 to 32) he states that the discoverer, when the statutory privileges are granted to him, "will hold the Island at the pleasure of Congress," or as he again, more rhetorically, puts it (p. 32), he is "the Nation's tenant at will." In the opinion in Jones' case (p. 6, of the printed office copy), the possession under the guano legislation is classified as held "only for the purpose of carrying on a par-

ticular business, such as catching and curing fish, or working mines," and the principle of public law, which authorize nations to take possession of unoccupied territory, for such purposes, is invoked by the Court as a warrant for the guano legislation in question. The note 104 to Sec. 176, of Wheaton's Int. Law, already referred to, is cited by the Court in support of its views upon the point. Indeed, the case is more or less an exceptional one in the eye of international law. The nation does not exercise its rights either as conqueror or as discoverer of the Island. The Island of Navassa had been long known to navigators, as the diplomatic correspondence and all local maps and geographies show. Duncan did not affect to have discovered it. His only pretension was that he had discovered a deposit of guano upon it. The dominion, therefore, which the United States exercises is not strictly by virtue of that ownership of the soil, which conquest or discovery or treaty would have given. It is practically nothing more than a temporary holding of unoccupied and uninhabited land, for the purpose of enabling our citizens to carry away the fertilizing deposit to be found there. That deposit is most properly to be likened to a national treasure trove, and the Island is simply held to appertain to the United States until her citizens, according to the mode prescribed, shall have the opportunity to remove it for the benefit of our agriculture.

This statement appears to the counsel for the Appellees to render wholly inapplicable the common law doctrine of seisin in heritable estates. If, as held by Attorney General Black, the proclamation of the President makes the discoverer or his assigns tennants at will, it would seem very clear that such an estate is not subject to dower.

1 Scribner on Dower, 369.

It is a mere privilege or license to carry on a particular business or engage in a particular trade or commercial venture and the idea

of seisin cannot be associated with it. The Act does not authorize the President to give any title to the land or indeed to make the land a part of the National territory. It merely assumes control of the locality for the purpose of affording National protection to the exercise of a commercial privilege. This point is very clearly and ably stated in the opinion of the learned Court below, (Rec. p. 12) and its views could not be as well presented, as they are by its own language and reasoning, to which this Court is respectfully referred. The conclusion is arrived at, "that all that was intended, was to afford governmental sanction and protection to the exercise of a commercial privilege" and "that in the case of these Islands there is no ownership except that of mere occupancy and no patent or grant emanates from the United States nor anything approaching it in character." This is in strict accordance with the language of Section 5578 of the Revised Code, whereby it is provided that nothing contained in the title shall be construed as obliging the United States *to retain possession* of the Islands, &c., after the guano shall have been removed. No more distinct statutory declaration than this could be made, of the fact that the government does not assert any right, except that of mere "possession."

It is proper here to call attention to a portion of the statute, which is relied on by the Court below, as demonstrating that no such thing as a heritable estate was in contemplation of Congress. By the Act of 1872, Ch. 81, passed long after the proclamation in this case, and embodied in Section 5572 of the Revised Statutes, it is provided that "if the discoverer dies before perfecting proof of discovery or fully complying with the provisions of the preceding section, *his widow, heir, executor, or administrator* shall be entitled to the benefits of such discovery upon complying with the provisions of this title." Nothing is said as to the mode or direction in which the granted privileges shall pass, after the proclamation of the President has vested them in the

person who, in his judgment, is entitled to them. It is not very easy to interpret the clause of the statute just quoted, and in case of the death of a discoverer, at the stage of the proceedings which it indicates, it would probably require grave judicial consideration to determine the respective rights of the successors named, if the deceased should happen to have a wife, children and personal representatives. But it is believed to be very plain that the naming of executors and administrators, as entitled in the contingency provided for, puts an end to the contention that any heritable estate was intended to be granted, or any seisin conferred.

An executor or administrator as such, without more, can only take personal estate. Moreover, although the widow is named, she is placed on the same footing as the heirs and personal representatives, and the estate, which she will take, if the case provided for occurs, is not an estate in dower, but the same estate which will go to the heirs, or the personal representatives, in case they should take: *i. e.* the entire right to the privileges of the deceased discoverer. If executors and administrators had not been named, or if they could take realty, the clause might be interpreted by holding that the parties described would take according to their respective rights; but, as executors and administrators have no right to realty, that interpretation is not possible. Perhaps the only solution would be to give the discoverer's rights to the widow, heirs and personal representatives in the order named. But no interpretation appears possible that would not be inconsistent with the idea of a heritable estate in the discoverer with dower growing out of it.

As to the Applicability of the Common Law to the Case.

The questions already presented have been discussed, because they are in the case, under the Appellant's contention, and might be material in a possible aspect of the controversy. It is believed

however, by the counsel for the Appellees, that they are entirely unimportant in a proper view of the law of the case. The right to dower is not a natural right, but one dependent altogether upon positive law, and part of an organized system of inheritance. Unless there be some law by which the right to dower is specifically secured, it does not exist, and as there is no Federal legislation, affecting or defining the right, it cannot exist as to the territory embraced within the Island of Navassa, except upon the theory that the proclamation of the President declaring the Island to pertain to the United States carried with it, and into the Island, the common law of England. This last is in fact the definite contention of the petition, which rests the title of the petitioner, as has been stated, distinctly upon the "common law of this land." This, of course, can mean only the common law of the United States as distinguished from the common law operative in the respective States. The territory in dispute is within the jurisdiction of no particular State of the Union and no rights to land there can arise from State law of any sort. As dower is always the creature of the *lex loci* no law except that governing the *locus* can be applicable to it. Now, if there is any proposition in the federal law which appears to be firmly established, by the whole current of decision, it is that there is no common law of the United States. Wherever the federal government rules, it rules by its statutes and not otherwise. This proposition was assumed by the Court to be fundamental, as to criminal law, in the case of Jones *vs.* United States (p. 5 of printed office copy of opinion), and there is no difference, in principle, between criminal and civil jurisdiction. "It is clear," says this Court, in the well-known copyright case of Wheaton *vs.* Peters (8 Peters, 591, 658), "*there can be no common law of the United States.* The federal government is composed of twenty-four sovereign and independent States: each of which may have its local

usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. *The common law could be made a part of our federal system only by legislative adoption.*" "The Constitution," says Judge Cooley, in summing up, "does not, of its own force, give to national tribunals jurisdiction [even] of the several cases which it enumerates, but an act of Congress is essential first to create courts and afterwards to appertain the jurisdiction among them."

Cooley on Constit. Limit, 5th Edit., 27.

The same doctrine is recognized in

Kendall *vs.* U. S., 12 Peters, 524, 621, and

Pennsylvania *vs.* Wheeling Bridge, 13 How., 518, 563.

Judge Story, in defining the jurisdiction and procedure in impeachment cases, states the general doctrine to be that "the common law cannot be a foundation of federal jurisdiction not given by the Constitution or laws," but that such "jurisdiction, when given, attaches and is to be exercised according to the rules of the common law."

1 Story on the Constitution, Sec. 799.

This limitation and definition is accepted by Chancellor Kent.

1 Kent's Commentaries, Marg., p. 343, note b., 12th Edition by Judge Holmes.

The proposition is succinctly stated in the minority opinion, in the Neagle case, in these words:

"The Common Law never existed in our federal system. The legislative power, possessed by the United States, must be found, either exercised in the Constitution as fundamental law, or by some person or body to whom it was delegated by the Constitution."

In re Neagle, 135 U. S., p. 91.

There was no quarrel with this doctrine on the part of the majority, whose ruling was that Neagle had only discharged a a duty which did arise under the laws of the United States.

Id., pp. 58, 59 *et seq.*

Although the rule recognized (*ubi supr.*) by Story and Kent is also laid down, substantially, by the Court in 1 Black's Rep., it is accompanied by the distinct statement that "jurisdiction, in common law cases, can never be exercised in the Federal Courts, unless conferred by an Act of Congress, because such Courts are Courts of special jurisdiction, and derive all their powers from the constitution and the laws of Congress passed in pursuance thereof."

Rice *vs.* R. R. Co., 1 Black, 358, 374. And see

Wells on Jurisdiction, Secs. 198 (p. 204); and 207 (p. 213).

Of course there is no question as to the power of Congress, by statute, to make the common law or any part of it applicable to the Guano Islands or Keys, which may be declared to be appurtenances of the United States under the legislation which we have been discussing. The insurmountable difficulty is that Congress has never done so. It has confined its legislation exclusively to the punishment of crimes committed on the Islands, and the application thereto of the regulations of the coasting trade. This limitation, by Congress itself, of the exercise of its jurisdiction, not only excludes the application of all other laws to the premises, but demonstrates the intention to exclude them and to legislate no farther. As the Circuit Court forcibly puts it—Navassa, like other territory in like cases, is unfit for human habitation or permanent settlement. The nation does not look to it as a possible colony, for it is wild and barren, incapable of agriculture, and made more and more valueless, as land, by the very removal of its only riches, which our legislation was intended to encourage and protect. To apply to it the com-

plicated rules and systems of real estate law prevailing in civilized communities where landed property exists, would have been a waste of legislative authority, and it has accordingly not been attempted. No real estate code has been adopted; no common law scheme has been applied; and, what is quite as material and conclusive, no jurisdiction has been conferred on any Court to administer any but the penal and navigation laws which the statute applies.

Instead of there being anything favorable to the Appellant's contention, in the analogies of the government of the Territories (proper) of the United States, it is believed that they are all the other way. The same right of Congress to govern and regulate exists in both cases, not only under the express provision of the constitution, but by necessary derivation from the right to acquire.

Mormon Church *vs.* United States, 136 U. S. Rep., pp. 1, 42, 43.

No other government, say the Court, in that case, can impose laws, and hence full legislative authority is vested in Congress. In an earlier case, the Court determined, explicitly, that "all territory within the jurisdiction of the United States, not included in any State, must be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominions of the United States, ... and Congress may legislate for them, as a State does for its municipal organizations."

National Bank *vs.* Yankton, 101 U. S., 129, 133.

It has never been held that the Territories are governed by the common law, or any other law, before they are organized under congressional enactment, except in so far as derived, under the rules of public law, from the law of the countries to which they may have belonged before becoming part of our national domain. (Cooley on Constit. Lim., 34, n. 2.) In all respects they are subject to the legislation of Congress, as held in the last cited case,

even to the extent of repealing laws enacted by the territorial legislation, under the organic acts. The distinction between local governments of this sort, "being known by the name of Territories," and understood to be meant when "the Territories" are spoken of, is plainly made and defined by the Court in a very recent case.

"Okaloma," said the late Mr. Justice Miller, speaking for the Court, "was not of this class of territories. It had no legislative body. It had no government. It had no established or organized government for the control of the people within its limits, as the Territories of the United States have and always have had."

In re Lane, 135 U. S., 443, 447.

This description of Okaloma meets the case of Navassa, as far as it goes. It leaves still open, however, the questions whether the Island can be said to have been "acquired" by the United States at all, in the full sense of that word in our law, and whether, as a barren accumulation of coral rocks in mid-ocean, fit only for the temporary residence of laborers, and wholly incapable of progress, development, colonization or civilization, it is at all within the scope or policy of principles applicable to territory, which sooner or later as a State, must form part of the National Union.

So far as the question of mining is concerned, it will not, of course, escape the attention of the Court, that in the mining States and territories a species of local common law or usage, relating to mining rights and titles, has sprung up, having its origin among the miners, which the Courts have recognized in many cases.

Cooley on Constit. Lim., p. 34, note 2, marg. 25.

It is recognized also by the Revised Code, Sec. 2319, Ch. 6, of Title 32, relating to the Public Lands and to Mineral Lands and Mining Resources.

In the chapter just cited, the whole position of the government towards mines is fully developed and it has so often presented

material for adjudication, by this Court, as not to require comment. It is established, however, that even in the organized territories and the States, where public lands lie, the rights of mine owners and miners are the subject of special legislation and definition, and have never been controlled by the Common Law of England. In some of the States and Territories, they differ from those existing in others.

Mining Co. *vs.* Taylor, 100 U. S., 3742.

In one of the cases the distinction is sharply drawn between mine owners, who are such because they own the soil in fee, and the owners of "mining claims," who "have only *a possessory right to explore and work the mines* under the existing laws and regulations on the subject."

Forbes *vs.* Gracey, 94 U. S., 762.

If there be any analogy at all between the Territorial mining rights and the guano privileges, this distinction seems the best criterion of it.

S. T. WALLIS,
for the Appellees.